

(24,853)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 570.

THE TOLEDO RAILWAYS & LIGHT COMPANY,
PLAINTIFF IN ERROR,

vs.

WALTER L. HILL AND RALPH L. SPOTTS, AS EXECU-
TORS OF THE LAST WILL AND TESTAMENT OF
HARFORD B. KIRK, DECEASED.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print
Writ of error.....	1	1
Summons	4	2
Complaint	5	2
Petition for removal into United States district court.....	10	4
Order for removal.....	15	7
Bond for removal.....	16	7
Certificate of clerk of State court.....	18	9
Order to show cause why service of summons and complaint should not be vacated, etc.....	19	10

	Original.	Print
Affidavit of Frank R. Coates in support of motion to vacate, etc.	21	11
Frank W. Frueauff in support of motion to vacate, etc.....	24	13
Robert Burns in support of motion to vacate, etc....	27	14
Paul M. Herzog in opposition to motion to vacate, etc.....	31	16
Frank W. Frueauff in support of motion to vacate, etc.....	36	18
Paul M. Herzog in opposition to motion to vacate, etc.....	41	20
Exhibit A—First mortgage bond, Toledo Railways & Light Com- pany.....	45	22
Memorandum opinion, Hough, J., on motion to set aside, etc....	52	25
Order denying motion to set aside, etc.....	55	26
Answer	58	27
Minute entries of trial.....	66	31
Judgment	67	31
Stipulation as to exhibits, etc.....	70	32
Certificate of jurisdictional question.....	75	35
Petition for a writ of error.....	80	37
Order allowing writ of error.....	82	38
Assignment of errors.....	84	39
Bond on writ of error.....	87	40
Stipulation as to record.....	89	42
Citation and service.....	91	43
Stipulation as to correctness of record.....	93	44
Clerk's certificate	95	44

1

Writ of Error.

UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the District Court, before you, or some of you, between Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, deceased, plaintiffs and The Toledo Railways & Light Company, defendant, a manifest error hath happened, to the great damage of the said The Toledo Railways & Light Company, as is said and appears by its complaint, We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the Supreme Court of the United States at Washington, together with this writ, so that you have the same at the said place before the Justices aforesaid, on the 29th day of July, 1915, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court of the United States may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable William I. Grubb, United States District Judge, Southern District of New York, this 1st day of July, in the year of our Lord one thousand nine hundred and fifteen, and of the Independence of the United States the one hundred and thirty-ninth.

ALEX GILCHRIST, JR.,
*Clerk of the District Court of the United States
of America for the Southern District of New
York, Second Circuit.*

The foregoing writ is hereby allowed.

W. I. GRUBB,
U. S. District Judge.

3 [Endorsed:] L. 13-100. United States Supreme Court.
The Toledo Railways & Light Company, plaintiff in error (defendant below) against Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, deceased, defendants in error (plaintiffs below). (Copy.) Writ of Error. Frueauff & Robinson, attorneys for plaintiff in error. Office and P. O. address, 60 Wall Street, Borough of Manhattan, New York. Filed

U. S. District Court S. D. of N. Y., July 2, 1915. Service of a copy of the within writ of error is hereby admitted this 13th day of July, 1915. Kendall & Herzog, attorneys for defendant in error.

4 Supreme Court, County of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS AND LIGHT COMPANY, Defendant.

Summons.

To the above-named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's attorneys within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated, April 20", 1914.

KENDALL & HERZOG,
Attorneys for Plaintiffs.

Office & P. O. Address: 233 Broadway, Borough of Manhattan, City of New York.

5 Supreme Court, County of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS AND LIGHT COMPANY, Defendant.

Complaint.

The plaintiffs, by Kendall & Herzog, their attorneys, complain of the defendant and allege as follows:

I. On or about the 5th day of September, 1907, Letters Testamentary on the Estate of Harford B. Kirk, late of the County of New York, deceased, were duly granted to the said plaintiffs by the Surrogates' Court in and for the County of New York, and they thereupon duly qualified. The said Letters Testamentary have not been revoked, and the plaintiffs ever since the granting of said letters testamentary have acted and are now acting as such executors.

II. The said plaintiff, Ralph L. Spotts, is a resident of the City and State of New York; the plaintiff, Walter L. Hill, is a resident of Boston, in the State of Massachusetts.

III. On information and belief, the said defendant at the times hereinafter mentioned was and now is a foreign corporation created and existing under the laws of the State of Ohio.

6 IV. On or about August 10th, 1901, the defendant duly made, signed, executed, sealed and delivered, for value received, the several coupon bonds of said defendant hereinafter mentioned.

V. The said coupon bonds bear date on the said 10th day of August, 1901, and purport to be some of the bonds of a series of coupon bonds numbered 1 to 12000 inclusive, for the sum of \$1,000. each, and are made payable in gold coin of the United States of America of the then standard of weight and fineness, on the 1st day of July, 1909, at the fiscal office of said defendant in the City of New York, with interest thereon at the rate of 4% per annum payable at the said fiscal office upon the first days of January and July in each year until the payment of the principal amount thereof, upon presentation of the interest coupons thereto attached, in each of which defendant promises to pay the bearer the sum of twenty (\$20) Dollars, as aforesaid.

VI. Said bonds are made payable to the bearer or the registered owner, if said bonds should be registered, and are therein stated to be secured by a certain deed of trust or mortgage bearing even date with said bonds, duly executed and delivered by said defendant to The United States Mortgage and Trust Company of the City of New York, as trustee; and it is expressed in the said bonds that they respectively shall not become valid or obligatory until they shall have been authenticated by the certificate of The United States Mortgage and Trust Company of New York City, trustee, endorsed
7 upon them.

VII. Plaintiff's testator, at the time of his death, was the owner and holder by delivery of twenty-five of said coupon bonds, hereinbefore mentioned and described, respectively numbered 9126, 9128, 9519, 9520, 9521, 10057, 10058, 10059, 10060, 10061, 10062, 10063, 10064, 10331, 10332, 10475, 10476, 10477, 10478, 10479, 10480, 10481, 10482, 10483, 10484, which bonds were not and are not registered.

VIII. Each of the said coupon bonds so owned by plaintiff's testator, was and is duly authenticated by said certificate indorsed thereon and duly signed by the said trustee.

IX. The said plaintiffs duly demanded payment of the said twenty-five bonds and the coupons thereto attached, at the fiscal office of the said company in New York, on or about the first day of July, 1909, but payment was not made of any of said bonds, nor has any of them, nor any part of them, hitherto been paid, and three (3) coupons for Twenty Dollars (\$20) each, attached to each of said bonds, are still wholly unpaid.

X. The said sum of Twenty-six thousand five hundred (\$26,500) Dollars and interest from July 1st, 1909, is justly due to plaintiffs from the defendant over and above all counterclaims known to these plaintiffs or either of them.

- Wherefore, plaintiffs demand judgment against the defendant for the sum of Twenty-six thousand, five hundred (\$26,500)
 8 Dollars, with interest thereon from the first day of July, 1909, together with costs and disbursements of this action.

KENDALL & HERZOG,
Attorneys for Plaintiffs.

Office & P. O. Address: 233 Broadway, Borough of Manhattan, City of New York.

STATE OF NEW YORK,
County of New York, ss:

Ralph L. Spotts, being duly sworn, deposes and says that he is one of the plaintiffs named in the above entitled action; that he has read the foregoing complaint and knows the contents thereof, and the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

RALPH L. SPOTTS.

Subscribed and sworn to before me this 20th day of April, 1914.

ARTHUR S. LEVY,
Commissioner of Deeds, City of New York, #15.

- 9 [Endorsed:] Supreme Court, New York County. Walter L. Hill and Ralph L. Spotts, as Executors, &c., of Harford B. Kirk, deceased, Plaintiffs, against The Toledo Railways and Light Company, Defendant. Copy. Summons and Complaint. Kendall & Herzog, Attorneys for Plaintiffs, 233 Broadway, Borough of Manhattan, N. Y. City.

- 10 *Petition for Removal Into United States District Court.*

County Clerk's Index No. 17894, Year 1914.

Supreme Court, County of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
 against

THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

To the Honorable the Supreme Court of the State of New York in and for the County of New York:

The Toledo Railways & Light Company, the defendant above named, appearing specially and for the sole and single purpose of presenting this petition, respectfully shows to this Court as follows:

I. That the above entitled action is a suit of a civil nature at law or in equity, and was commenced by the issuance and service of a

summons on or about the 29th day of June, 1914. That said summons, together with the complaint herein, was served in the City of New York upon Frank W. Frueauff, as vice-president of the defendant The Toledo Railways & Light Company, on the 29th day of June, 1914. That said suit is pending undetermined in this court, and that the time within which the defendant The Toledo Railways & Light Company is required by the laws of this state and the rules of this court to answer or plead to the declaration or complaint of the plaintiff has not yet expired.

11 II. That this action has been commenced by the plaintiffs as executors of the last Will and Testament of Harford B. Kirk, deceased, against the defendant to recover the sum of Twenty-six Thousand Five Hundred Dollars, (\$26,500), with interest from July 1st, 1909, upon allegations in the complaint that plaintiffs' testator, at the time of his decease, was the owner and holder, by delivery, of a certain twenty-five (25) coupon bonds of the defendant of the sum of One Thousand Dollars (\$1,000) each, dated on or about August 10th, 1901, payable on July 1st, 1909, with interest at the rate of four per cent. (4%) per annum, payable semi-annually upon the presentation of the interest coupons therefor, thereto attached, and that said bonds have not been paid and the interest thereon is in arrears from July 1st, 1909. That the matter and amount in dispute in the above entitled action exceed, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000).

12 III. That the controversy in said suit is between citizens of different states. That the plaintiff Ralph L. Spotts is and was at the time of the commencement of said suit, and at all times since has been a resident of the Borough of Manhattan, City, County and State of New York, and that the plaintiff Walter L. Hill is and was at the time of the commencement of said suit and at all times since has been a resident of the City of Boston, State of Massachusetts, and that Harford B. Kirk, plaintiff's testor, was, prior to the time of his decease, a resident of the County and City of New York, and that letters testamentary on the estate of said Harford B. Kirk were duly granted to said plaintiffs by the Surrogate's Court in and for the County of New York, and the plaintiffs thereupon duly qualified, all as appears from the allegations of the complaint herein and from the records in said Surrogate's Court in and for the County of New York, and that the defendant, The Toledo Railways & Light Company, at the time of the commencement of said suit, was and ever since has been and still is a foreign corporation, organized, created and existing under and by virtue of the laws of the State of Ohio, and a non-resident of the State of New York.

IV. That your petitioner herewith presents a bond of good and sufficient surety for its entering into the District Court of the United States, for the Southern District of New York, within thirty days from the date of the filing of this petition, a certified copy of the record of this suit and for paying all costs that may be awarded by

the said District Court if the said District Court shall hold that this suit was wrongfully or improperly removed thereto.

That your petitioner further offers to furnish such other and further security or do such other act or thing or both as may be reasonably required in the premises.

V. That an order to show cause and for a stay is asked for because there is not sufficient time to give the usual notice of motion prior to the time when defendant is required to plead, answer or otherwise move herein, which said time expires on the 19th day of July, 1914.

That no previous application has been made for the order or relief herein asked.

Wherefore, your petitioner, pursuant to the provisions of the Statutes of the United States, prays this Honorable Court to
 13 proceed no further in this cause, to accept this petition and the said bond, and to cause the records herein to be removed into the said District Court of the United States, in and for the Southern District of New York, and that your petitioner have such other and further relief as the facts warrant and as may be just, and and your petitioner will ever pray.

Dated, New York City, July 15th, 1914.

THE TOLEDO RAILWAYS & LIGHT
 COMPANY,

By FRANK W. FRUEAUFF, *Vice-President.*

FRUEAUFF & ROBINSON,

Attorneys for Defendant, Appearing Specially.

Office and P. O. Address, 60 Wall Street, Borough of Manhattan, City of New York.

14 STATE OF NEW YORK,
County of New York, ss:

Frank W. Frueauff, being duly sworn, says: That he is the Vice-President of The Toledo Railways & Light Company, the defendant and petitioner above named; that he has read the foregoing petition and known the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason this verification on behalf of the defendant The Toledo Railways & Light Company, is made by deponent and not by the said defendant is that said defendant is a foreign corporation, and that deponent is an officer thereof, to wit, its Vice-President.

FRANK W. FRUEAUFF.

Sworn to before me this 15th day of July, 1914.

EDNA A. STOKES,
Notary Public, Kings County, No. 342.

Certificate filed in New York County No. 808; New York Register No. 5470.

15

Supreme Court Order No. 445.

Index Number 17894, Year 1914.

New York Supreme Court, County of New York, Special Term,
Part I.*Order on Removal.*WALTER L. HILL, &c.,
against

TOLEDO RAILWAYS & LIGHT COMPANY.

Present: Hon. Leonard A. Giegerich, Justice.

The following papers numbered 1 to — read on this motion
defaulted this 21 day of July, 1914.

Papers numbered.

Order to Show Cause and Affidavits Annexed & Bond 1 to 3

Upon the foregoing papers this motion to remove to United States
Court granted on default. Bond approved.

L. A. G., J. S. C.

Dated July 21, 1914.
Filed Jul- 21, 1914.

16

Bond on Removal.

Know all men by these presents, That the National Surety Company, a New York Corporation, having an office and principal place of business at No. 115 Broadway, Borough of Manhattan, in the City of New York, and State of New York, is held and firmly bound unto Walter L. Hill and Ralph L. Spotts as Executors of the last Will and Testament of Harford B. Kirk, deceased, in the penal sum of Five Hundred Dollars, for the payment whereof well and truly to be made unto the said Walter L. Hill and Ralph L. Spotts as Executors of the last Will and Testament of Harford B. Kirk, deceased, their heirs, representatives and assigns, it binds itself, its representatives and assigns, firmly by these presents.

Upon these conditions: The Toledo Railways & Light Company being about to petition the Supreme Court of the State of New York, held in and for the County of New York for the removal of a certain cause therein pending, wherein the said Walter L. Hill and Ralph L. Spotts as Executors of the last Will and Testament of Harford B. Kirk, deceased, are the plaintiffs and the said The Toledo Railways & Light Company the defendant, to the District Court of the United States, for the Southern District of New York.

Now, if the said The Toledo Railways & Light Company shall enter in such District Court of the United States within thirty days

from the date of filing said petition a certified copy of the record in such suit, and shall well and truly pay all costs that may be awarded by said the District Court of the United States, if said District Court shall hold that such suit was wrongfully or improperly removed thereto and also shall appear and enter special bail in such suit if special bail was originally requisite therein then this obligation to be void, otherwise to remain in full force and virtue.

In Witness Whereof, the said National Surety Company, has caused its corporate seal to be hereto affixed, and these presents to be signed by its duly authorized officers on the 15th day of July 1914.

In the presence of

NATIONAL SURETY COMPANY.
By WM. A. THOMPSON,
Resident Vice-President.

Attest:

E. M. MCCARTHY,
Resident Assistant Secretary.

17 STATE OF NEW YORK,
County of New York, ss:

On the 15th day of July in the year 1914, before me personally came Wm. A. Thompson to me known, who, being by me duly sworn, did depose and say that he resided in the City of New York; that he is the Resident Vice-President of The National Surety Company, the corporation described in and which executed the above instrument; that he knew the seal of said Corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said Corporation and that he signed his name thereto by like order.

PAUL P. MARCONE,
Notary Public, etc.

Copy of By-law.

Be it remembered, That at a regular meeting of the Board of Directors of the National Surety Company, duly called and held on the fourth day of February, 1908, a quorum being present, the following By-Law was adopted:

"Article XIII. Sec. 1. Signatures required.—All bonds, recognizances, or contracts of indemnity, policies of insurance, and all other writings obligatory in the nature thereof, shall be signed by "the President, a Vice-President, a Resident Vice-President or Attorney-in-Fact, and except when signed by an Attorney-in-Fact shall "have the seal of the Company affixed thereto, duly attested by the "Secretary, an Assistant Secretary or Resident Assistant Secretary. "All Vice-Presidents and Resident Vice-Presidents shall each have "authority to sign such instruments, whether the President be absent "or incapacitated or not; and the Assistant Secretaries and Resident

"Assistant Secretaries shall each have authority to seal and attest such instruments, whether the Secretary be absent, or incapacitated or not. All such instruments executed as herein provided shall be as binding upon the Company as if the same were signed by the President and duly sealed and attested by the Secretary."

[Endorsed:] New York Supreme Court, County of New York. Walter L. Hill and Ralph L. Spotts as Executors of the last Will and Testament of Harford B. Kirk, deceased, Plaintiffs, against The Toledo Railway & Light Company, Defendant. Removal Bond. National Surety Company, Surety. I approve of the within Bond, and of the sufficiency of the surety. Leonard A. Giegerich, Justice Supreme Court, State of New York.

STATE OF NEW YORK,

County of New York, ss:

I, E. M. McCarthy, Resident Assistant Secretary of the National Surety Company, have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and the whole of said original By-Law.

Given under my hand and the seal of the Company this 15th day of July, 1914.

E. M. MCCARTHY,
Resident Assistant Secretary.

18 STATE OF NEW YORK,
County of New York, ss:

I, William F. Schneider, Clerk of the said County and Clerk of the Supreme Court of said State for said County, do certify, that I have compared the preceding with the original Record of Removal to U. S. Court with Bond and approval in re Walter L. Hill &c., plaintiffs, vs. The Toledo Railways & Light Co. Deft. on file in my office, and that the same are correct transcripts therefrom and the whole of such originals.

In witness whereof, I have hereunto subscribed my name and affixed my official seal this 18th day of August, 1914.

[SEAL.]

WILLIAM F. SCHNEIDER, *Clerk.*

- 19 *Order to Show Cause Why Service of Summons & Complaint Herein Should Not Be Vacated, etc.*

In the District Court of the United States for the Southern District of New York.

WALTER H. HILL and RALPH L. SPOTTS, as Executors of the Last Will & Testament of Harford B. Kirk, Deceased, Plaintiffs,
against

THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

Upon the annexed affidavits of Frank R. Coates, verified the 11th day of September, 1914, Robert Burns, verified the 11th day of September, 1914, and of Frank W. Frueauff, verified the 11th day of September, 1914, and upon all the pleadings, papers and proceedings herein and on motion of Frueauff & Robinson, attorneys for the defendant, The Toledo Railways & Light Company, appearing specially for the purpose of moving to vacate the service of the summons and complaint herein, it is

Ordered that the plaintiffs or their attorneys show cause before this Court at a term thereof to be held at the Post Office Building in the City, County and State of New York on the 16th day of September, 1914, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why the service of the summons and complaint herein should not be vacated and all proceedings had thereon set aside on the ground that the attempted service of the summons and complaint herein on the defendant corporation, by delivering a copy of the same to Frank W. Frueauff, an officer thereof, in the City, County and State of New York, was not sufficient to confer on this Court jurisdiction over the person of the defendant and was not due service upon said defendant corporation inasmuch as said corporation is organized under the laws of the State of Ohio, maintains no office in New York State, does no business and owns no property therein and why such other and further relief in the premises as may be just, should not be granted. And it is

Further ordered that the service of this order to show cause and the affidavits upon which it is granted by delivering a copy of the same at the office of the attorneys for the plaintiffs herein on or before the 14th day of September, 1914, shall be sufficient. And it is

Further ordered that all proceedings herein be stayed pending the determination of this motion and that the defendant's time to plead herein or to make such motion relative to the complaint as it may be advised, be and the same hereby is extended until five days after the entry of an order hereon and the service of notice of entry thereof.

Dated, September 12, 1914.

J. M. MAYER, J. D. C.

21 *Affidavit of Frank R. Coates in Support of Motion to Vacate
Service of Summons & Complaint.*

In the District Court of the United States for the Southern District
of New York.

WALTER H. HILL and RALPH L. SPOTTS, as Executors of the Last
Will & Testament of Harford B. Kirk, Deceased, Plaintiffs,
against

THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

STATE OF OHIO,
County of Lucas, ss:

Frank R. Coates being duly sworn, deposes and says:

First. That he is President of the defendant company, The Toledo
Railways & Light Company, which appears herein specially for the
purposes of this motion only.

Second. That the defendant company, The Toledo Railways &
Light Company, is a corporation organized and existing under the
laws of the State of Ohio, with its principal office in the City of
Toledo, County of Lucas and State of Ohio; that said corporation,
as stated in its Articles of Incorporation, is located in the City of
Toledo, Lucas County and State of Ohio, and its principal business
is there transacted; that said corporation, as stated in said Articles
of Incorporation, is formed for the purpose of constructing, main-
taining, operating, extending, purchasing, acquiring, leasing and
owning street railroads and railroads operated as street rail-
22 roads to be operated by electric power together with all the
property real, personal and mixed, and all franchises, rights
and privileges respecting the use and operation of the same, and for
all purposes incidental thereto in the City of Toledo, Lucas County,
Ohio, and of doing all matters and things proper to such business, in-
cluding the manufacturing, procuring, providing, furnishing, con-
veying and distributing of all power, heat and light that is now or
may hereafter be found to be proper, convenient or desirable in the
carrying out of such purpose, and incidental to such purpose, to use,
maintain and operate all electric light and power property, rights,
privileges and franchises, which said corporation may lease or pur-
chase.

Third. That all of the properties of The Toledo Railways & Light
Company are located in the said State of Ohio in or in the vicinity
of the City of Toledo in said State and all of said Company's busi-
ness is transacted in said State.

Fourth. On information and belief that the plaintiffs above named
undertook to institute this action in the Supreme Court of the State
of New York by an alleged service of summons and complaint upon
one Frank W. Frueauff as a Director and Vice-President of said de-
fendant company, The Toledo Railways & Light Company, by de-
livering a copy of said summons and complaint herein to said Frank

W. Frueauff in the City, County and State of New York, on or about the 29th day of June, 1914. That thereafter defendant company herein caused such steps to be taken that said alleged action so instituted as aforesaid was removed to the District Court of the United States for the Southern District of New York on or about the 16th day of July, 1914, and a certified copy of the record was
23 thereafter duly filed in said District Court of the United States for the Southern District of New York, all as appears from the record herein.

Fifth. That the Board of Directors of said Company consists of nineteen (19) members, all of whom reside without the State of New York, with the exception of three (3) directors of the defendant company who reside in said State; that said Frank W. Frueauff, to whom a copy of the summons and complaint in this action was delivered, although a Director and Vice-President of the Company, is not now and has never been actively engaged in or connected with the executive management of the defendant company, nor does he now or has he ever performed any executive duties in connection with the office he now holds.

Sixth. Deponent states the fact to be that the defendant company has not now nor has it had for the last five years past an office in the State of New York nor in any place except the City of Toledo, State of Ohio; that said defendant company does not now nor did it ever transact any business in the State of New York nor in any state except the State of Ohio; that said defendant company has not now nor has it had since the month of October, 1913, any property in the State of New York nor in any State except the State of Ohio.

FRANK R. COATES.

Sworn to before me this 11th day of September, 1914.

[SEAL.]

A. C. VAN DRIESEN,

Notary Public in for Lucas County, Ohio.

My commission expires March 11th 1917.

Certificate of Clerk of Common Pleas, Lucas Co. as to notary authority attached.

24 *Affidavit of Frank W. Frueauff in Support of Motion to
Vacate Service of Summons & Complaint.*

In the District Court of the United States for the Southern District
of New York.

WALTER R. HILL and RALPH L. SPOTTS, as Executors of the Last
Will & Testament of Harford B. Kirk, Deceased, Plaintiffs,
against

THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Frank W. Frueauff being duly sworn, deposes and says:

First. That he is Vice-President of the defendant company, The Toledo Railways & Light Company, which appears specially herein for the purposes of this motion only.

Second. That the defendant, The Toledo Railways & Light Company, is a corporation, organized and existing under the laws of the State of Ohio, with its principal office in the City of Toledo, State of Ohio, as appears from the affidavit of its President, Frank R. Coates, annexed hereto; that it is engaged in the business of managing and operating street railroads and electric properties; that, as appears from the said affidavit of Frank R. Coates, all the business and property of the Company is confined to the State of
25 Ohio.

Third. That the plaintiffs above named undertook to institute this action in the Supreme Court of the State of New York by an alleged service of summons and complaint upon deponent as a Director and Vice-President of said defendant company, The Toledo Railways & Light Company, by delivering a copy of said summons and complaint herein to deponent in the City, County and State of New York, on or about the 29th day of June, 1914. That thereafter defendant company herein caused such steps to be taken that said alleged action, so instituted as aforesaid, was removed to the District Court of the United States for the Southern District of New York, and a certified copy of the record was thereafter duly filed in said District Court of the United States, for the Southern District of New York, all as appears from the record herein.

Fourth. Deponent became a Director of the defendant corporation on or about April, 1913, and one of the Vice-Presidents of said Company on or about January, 1914; that since his election as Director and Vice-President of said corporation, deponent has never been actively engaged in or connected with the executive management of defendant company, nor does deponent now nor has he ever performed any executive duties in connection with the offices he now holds; and deponent has never represented the defendant corporation in any business or transaction in the State of New York.

Fifth. Deponent alleges, on information and belief, that at the

time of the attempted institution of this suit and subsequent thereto, the defendant company had no office or place of business in the State of New York, nor did it transact any business in the State of New York, nor has it any property in said State.

FRANK W. FRUEAUFF.

Sworn to before me this 11th day of September, 1914.

[SEAL.]

THOMAS H. FAIR,

Notary Public.

New York County No. 1054.

New York Register No. 5104.

27 *Affidavit of Robert Burns in Support of Motion to Vacate Service of Summons & Complaint.*

In the District Court of the United States for the Southern District of New York.

WALTER H. HILL and RALPH L. SPOTTS, as Executors of the Last Will & Testament of Harford B. Kirk, Deceased, Plaintiffs,
against

THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Robert Burns being duly sworn, deposes and says:

First. That he is associated with the firm of Frueauff & Robinson, the attorneys for the defendant. The Toledo Railways & Light Company, appearing specially for the purposes of this motion only, and is familiar with the matters and proceedings in this action.

Second. That the defendant, The Toledo Railways and Light Company, is a corporation, organized and existing under the laws of the State of Ohio, with its principal office in the City of Toledo, State of Ohio, as appears from the affidavit of its President, Frank R. Coates, annexed hereto; that it is engaged in the business of managing and operating street railroads and electric properties; that, as appears from the said affidavit of Frank R. Coates, all the
28 business and property of the Company is confined to the State of Ohio.

Third. That the plaintiffs above named undertook to institute this action in the Supreme Court of the State of New York by an alleged service of summons and complaint upon one Frank W. Frueauff as a Director and Vice-President of said defendant Company. The Toledo Railways & Light Company, by delivering a copy of said summons and complaint herein to said Frank W. Frueauff in the City, County and State of New York, on or about the 29th day of June, 1914. That thereafter defendant company herein caused such steps to be taken that said alleged action so instituted as aforesaid was removed to the District Court of the United States for the Southern District of New York, and a certified copy of the

record was thereafter duly filed in said District Court of the United States, for the Southern District of New York, all as appears from the record herein.

Fourth. That as more particularly appears from the affidavit of Frank R. Coates, the President of the defendant Company hereto annexed, at the time of said attempted service of the summons and complaint as aforesaid, said defendant transacted no business in the State of New York, owned no property therein and maintained no office in said State; that all of said defendant's business and operations were at said times confined to the State of Ohio. That this order to show cause and a stay is asked for, for the reason that prior to the determination of this application, the time of the defendant to plead herein or to make such other motion relative to the complaint as it may be advised, may expire.

That no previous application has been made for the relief herein asked or any part thereof.

ROBERT BURNS.

Sworn to before me this 11th day of September, 1914.

[SEAL.]

HARRIET C. THIRKIELD,
Notary Public, Kings Co., No. 149.

Certif. filed in New York County, No. 47.
New York Register No. 5117.

30 [Endorsed:] L-13-100. United States District Court, Southern District of New York. Walter H. Hill and Ralph L. Spotts as Executors of the Last Will & Testament of Harford B. Kirk, deceased, Plaintiffs, against The Toledo Railways & Light Company, Defendant. (Copy.) Affidavits and Order to Show Cause. Frueauff & Robinson, Attorneys for Defendant—appearing specially. Office and P. O. Address, 60 Wall Street, Borough of Manhattan, New York. Service of the within affidavits and order to show cause by receipt of copies thereof is admitted this 14 day of September, 1914. Kendall & Herzog, Attorneys for Plaintiffs. Filed Oct. 7, 1914. U. S. District Court, S. D. of N. Y.

31 *Affidavit of Paul M. Herzog in Opposition to Motion to Vacate
Service of Summons & Complaint.*

In the District Court of the United States for the Southern District
of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last
Will & Testament of Harford B. Kirk, Deceased, Plaintiffs,
against

THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Paul M. Herzog, being duly sworn, says:

I am a member of the firm of Kendall & Herzog, attorneys for the
plaintiffs above named.

This affidavit is made in opposition to defendant's motion to vacate the service of the summons and complaint herein.

The action was brought to recover the sum of Twenty-six thousand five hundred (\$26500) Dollars, moneys due upon certain coupon bonds heretofore issued by this defendant and owned by plaintiffs' testator, as appears from the complaint (Paragraph "V").

The bonds in question bear date of August 10th, 1901, and are payable July 1st, 1909, at the fiscal office of the defendant in the City of New York. By their terms, the bonds are stated to be secured by a certain deed of trust or mortgage bearing even date with said bonds, and executed and delivered by this defendant to

32 the United States Mortgage and Trust Company of the City of New York, as trustee; and it is expressed in the bonds that they should not become valid or obligatory until they should have been authenticated by the Certificate of the United States Mortgage and Trust Company of the City of New York as such trustee (Paragraph "VI" of the complaint).

As appears further from the said complaint, each of the bonds in suit is so authenticated by said certificate indorsed thereon and duly signed by the said trustee (paragraph "VIII" of the complaint).

The plaintiffs' testator was a resident of the City and County of New York, and the Letters Testamentary upon his estate were issued by the Surrogates' Court, New York County (paragraph "I" of the complaint).

It is admitted by the moving papers herein that until October, 1913, more than four years after the bonds became due, the defendant had property within the State of New York (paragraph "Sixth" of the affidavit of Frank R. Coates, the President of the defendant corporation).

So that we have a resident of the City of New York obtaining bonds of a foreign corporation here in New York, and payable at its fiscal office in the City of New York. In other words, a contract is entered into by a resident of New York in the City of New York,

and which by its terms is to be wholly performed within the City of New York, and defendant admits that when this contract was to be closed, i. e., when the bonds were to be paid on July 1st, 1909, it had property within the State of New York, and was thus doing
 33 business here. When payment was demanded, however, defendant failed to pay any part of the moneys due, and when this suit is commenced, it makes the claim that inasmuch as it is a foreign corporation and has now no assets within the State of New York, it should not be compelled to defend itself in the Courts of any State other than those of Ohio, the State in which it was incorporated.

It is respectfully submitted, however, that the contract having been made in New York by a resident of New York, and being one which by its terms was to be, and but for the failure of the defendant, would have been fully performed in New York, that the plaintiff Executors should not be turned out of the Courts of this State.

Poor's Manual of Public Utilities, which is the standard reference work on the business and operation of Companies such as this, and which deponent has caused to be examined, states that the Doherty Operating Company of New York City has assumed the management of the properties of the defendant Company. It seems difficult to understand how the Doherty Operating Company can manage defendant's business in New York City without bringing the defendant under our jurisdiction. Frank W. Fruehauff the affiant and Vice President of defendant is actively associated with said Doherty & Co.

The action was originally commenced in the Supreme Court, New York County, and upon application of this defendant was removed to this Court, and the defendant should not now be heard to say that this Court has no jurisdiction; that because it has now no property within the State of New York, the service of the summons and complaint herein upon its Vice President and one of the Directors was therefore defective.

34 All of which is respectfully submitted.

PAUL M. HERZOG.

Sworn to before me this 29th day of September, 1914.

JULIUS WALERSTEIN,
*Notary Public, New York County; New York
 County No. 4165; New York Register No. 5174.*

35 [Endorsed:] In the District Court of the United States, for the Southern District of New York. Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs, against The Toledo Railways and Light Company, Defendant. Copy. Affidavit in Opposition to Motion. Kendall & Herzog, Attorneys for Plaintiffs, 27 William Street, Borough of Manhattan, N. Y. City.

ceives a consideration, but deponent states the fact to be that no member of said firm of Henry L. Doherty & Co., nor any one employed by them, is actively engaged in the executive management of said The Toledo Railways & Light Company other than the fact that Henry L. Doherty and Frank W. Frueauff, two of the members of said firm, and one Milan R. Bump, who is associated with said firm, are three of the nineteen directors of said The Toledo Railways & Light Company, and deponent is one of the Vice-Presidents of said Company; that none of said persons receive any salary as directors or Vice-President, or in any other capacity whatsoever from The Toledo Railways & Light Company.

Fifth. Deponent further states the fact to be that although a director and a Vice-President of said corporation, he is not actively engaged in the executive management of the Company and has never represented said defendant company in any transactions in the State of New York.

Sixth. Deponent further states that to the knowledge and belief of deponent, the defendant corporation has never transacted any business in the State of New York. Deponent alleges, on information and belief, that for convenience of certain bond-holders of the corporation, the defendant company caused interest on certain of its bonds to be paid at the office of Kean, Van Cortland & Co., predecessor of the present firm of Kean, Taylor & Co., in the City of New York; that no such interest has been paid at said office of Kean, Taylor & Co., nor at any office in the State of New York since the year 1909 and that since said year or the year immediately succeeding, the firm of Kean, Van Cortland & Co., ceased to act in any capacity whatsoever for said defendant company and has never since acted in any capacity for or on behalf of said Company.

Seventh. On information and belief, that The Toledo Railways & Light Company did not sell any of the bonds described in the complaint in the State of New York; that all of the bonds which were eventually offered for sale to the public, were purchased from The Toledo Railways & Light Company by the firm of Kean, Van Cortland & Co., and by said firm were sold to its customers; that the interest on said bonds was payable in New York at the office of said Kean, Van Cortland & Co., for the convenience of the customers of said firm who might become holders of said bonds.

Eighth. On information and belief, that at the time of the institution of this action, the defendant company was transacting no business, had no office and no property in the State of New York.

Ninth. Deponent states the fact to be that at the time of the institution of this action, the bonds described in the complaint were not listed upon the New York Stock Exchange, and further states, on information and belief, that said bonds were never so listed.

Tenth. That the sources of deponent's information and the grounds of his belief as to all matters not stated upon his knowledge, are records of The Toledo Railways & Light Company and reports of its officers and Agents.

FRANK W. FRUEAUFF.

Sworn to before me this 2nd day of Oct. 1914.

THOMAS A. FAIR.
Notary Public, N. Y. C. 1054.

40 [Endorsed:] District Court of United States Southern District of New York. Walter L. Hill and Ralph L. Spotts as Executors of the Last Will & Testament of Harford B. Kirk, Deceased, Plaintiffs, against The Toledo Railways & Light Company, Defendant. (Copy.) Affidavit in Support of Motion. Frueauff & Robinson, Attorneys for Defendant, Office and P. O. Address, 60 Wall Street, Borough of Manhattan, New York.

41 *Affidavit of Paul M. Herzog in Opposition to Motion to Vacate Service of Summons & Complaint.*

In the District Court of the United States for the Southern District of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of and Trustees under the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,

against

THE TOLEDO RAILWAYS AND LIGHT COMPANY, Defendant.

STATE OF NEW YORK,
County of New York, ss:

Paul M. Herzog, being duly sworn says:

1st. I have read the affidavit of Frank W. Frueauff verified October 2nd, 1914 submitted in the above entitled action. The attention of the Court is called to the following facts:

The Toledo Railways and Light Company, the defendant above named, has not been reorganized, and is still an existing corporation. The allegation in paragraph Second of said affidavit of Frank W. Frueauff merely says that the securities were reorganized, whatever that may mean.

It appears that there is a firm of Henry L. Doherty & Company which is interested in the so called City Service Company. It also appears that there is a corporation called the Doherty Operating Company. In the maze of interrelation between these various corporations, it is difficult to determine for what corporation an individual who is an officer of all of them is acting, but it is not presumptuous to infer that he doing business for all of them when his activities touch upon the business interests of the operating companies even though he may claim that his activity is merely concerned with his official duties as an officer of a holding company.

The attention of the Court is also called to the following extract from a certain circular called "Utilities Improvement Company—Plan and Subscription Agreement, New York, October 15th, 1912" issued in

October 1912, (and, as deponent believes, since carried into practical operation, though without any consent ever given on the part of plaintiffs) by the firm of Henry L. Doherty & Company:

"Our arrangement on the Toledo properties is with the Bondholders' and Stockholders' Committees and must be ratified by the majority of the stockholders of the old Company. We are to receive 25% of the Common Stock for agreeing to direct the management of the company for a period of five years and for underwriting (or in other words agreeing to buy if not bought by the old stockholders);

\$1,040,000. 6% Cumulative Preferred Stock

and

\$4,160,000. Common Stock

For \$1,040,000. Cash.

This stock however is to be first offered to the old stockholders on the basis of:

\$1,000 6% Preferred Stock

\$4,000 Common Stock

For \$1,000. Cash.

Whatever portion of this underwriting is not taken by the old stockholders will be taken by this Company. Therefore, the amount of common stock in Toledo Light and Railways Company which this Company will acquire under this plan will not be less than 25% and may be as much as 77%. The Common Stock is to be placed in a voting trust which will contract with us for the management of the property".

43 Deponent believes that management in New York City of its holding Company must entail "doing business in New York City" by the defendant corporation.

2nd. So far as the allegations in paragraphs Sixth and Seventh are concerned, deponent begs to submit to the Court an accurate copy, personally compared with an original bond, of one of the bonds in suit in this action (a copy of this bond being hereto annexed and marked Exhibit A), and calls the attention of the Court to the statement in the bond that it is payable, principal and interest "at the fiscal office of said corporation in the City of New York"; that the coupon is similarly payable; that the bond is endorsed "principal and interest payable in the City of New York"; that the bond is registered with the United States Mortgage and Trust Company of the City of New York, and is not valid until so registered; that it was prepared by the American Bank Note Company in the City of New York, a fact important to consider in view of the fact that this is necessary to entitle the bonds to be dealt in on the New York Stock Exchange.

3rd. Deponent further calls attention to the fact that the firm of Kean, Taylor & Company was a New York Banking house, and that it is almost impossible to believe that the bonds were purchased by that firm in any place other than in the City of New York. That it is undoubted that the bonds were purchased by the plaintiff's testator in the City of New York.

44

4th. That as deponent is informed and believes, the defendant Company has not paid any of the coupons or any of the principal of any of the bonds, of the issue of which plaintiffs' bonds are a part, any where since 1909, and that it is because of this default and failure on their part that this action is brought.

PAUL M. HERZOG.

Sworn to before me this 9th day of October, 1914.

ARTHUR S. LEVY,

Commissioner of Deeds, New York City, No. 15.

45

EXHIBIT "A."

\$1000.

Number 9520.

Number 9520.

United States of America.

The Toledo Railways and Light Company.

Four Per Cent Consolidated First Mortgage Gold Bond.

Know all men by these presents, that The Toledo Railways and Light Company, a corporation created and existing under the laws of the State of Ohio, for value received, is indebted to the bearer hereof, or, if this bond be registered, then to the registered owner hereof, in the sum of One Thousand Dollars (\$1000), which it promises to pay on the first day of July, A. D. One Thousand Nine Hundred and Nine, (A. D. 1909), at the fiscal office of said Company in the City of New York, in gold coin of the United States of America of or equivalent to the present standard of weight and fineness, to the bearer hereof or to the registered owner of this bond (if registered), with interest thereon from and after the first day of July, A. D. One Thousand Nine Hundred and One, (A. D. 1901), at the rate of Four Per Cent (4%) per annum payable in the gold coin aforesaid, semi-annually on the first days of January and July in each year at the fiscal office of said Company in the City of New York, without deduction for any tax or taxes which said Company may be required to pay thereon, or retain therefrom under any present or future law of the United States of America, or any
46 state, country or municipality thereof, upon presentation and surrender of the interest coupons hereto attached as they respectively become payable.

This bond is one of a series of Twelve Thousand (12,000) bonds, numbered consecutively from one (1) to twelve thousand (12,000), both inclusive, all of like tenor, amount, date and effect, bonds numbers ten thousand and one, (10,001) to twelve thousand (12,000), both inclusive, being reserved as provided in said mortgage, to which reference is hereby made, for future extensions, betterments and improvements. The payment of the principal and in-

interest of all of said bonds is secured by a certain trust deed or mortgage of even date herewith, duly executed and delivered by said The Toledo Railways and Light Company, of Toledo, Ohio, to the United States Mortgage and Trust Company of the City of New York, as Trustee, conveying to said Trustee in trust to secure the payment of all said bonds, with interest, equally, all the real and personal property, rights, privileges, grants, contracts, securities, choses in action and franchises of said Company, including all property and rights thereafter to be acquired by it or consolidated with it, to which mortgage reference is hereby made, and each and all of the terms, conditions and agreements in which, including the right to declare the principal due upon six months' default as in said mortgage provided, are hereby made a part hereof, and this bond is issued, accepted and held subject to the same.

The holder hereof shall have no recourse to the liability of the incorporators or the present or future stockholders of said Company, or of any successor company for the payment of the principal and interest of this bond or any part thereof or the performance of any of the covenants or agreements in said mortgage contained, but hereby expressly waives the same.

47 This bond shall not be obligatory until authenticated by the certificate endorsed hereon of the United States Mortgage and Trust Company of New York City, Trustee, and is redeemable at any time at 102½ and interest, in the manner provided in said mortgage. This bond shall pass by delivery, unless registered.

In testimony whereof, said The Toledo Railways and Light Company has caused these presents to be signed by its President or Vice-President and Secretary, and its corporate seal to be hereto affixed and the accompanying sixteen (16) interest coupons to be authenticated by the fac-simile signature of its Secretary on this 10th day of August, One Thousand Nine Hundred and One.

THE TOLEDO RAILWAYS AND LIGHT
COMPANY,

By ALBIN E. LANG, *President*.

FRED S. BORTON, *Secretary*.

\$1,000.

State of Ohio.

\$1,000.

American Bank Note Company, New York.

Across the face of this bond there is printed the following figures:
1000.

(Reverse side of the above bond.)

Registration.

This bond may be registered in the owner's name on books kept by said United States Mortgage and Trust Company at its office in

the City of New York, such registry being noted on the bond by said Trust Company's Secretary or Transfer Agent, after which no transfers shall be valid, unless made on the Trust Company's books by the registered owner in person or by attorney in fact thereunto duly authorized in writing, and such transfer noted on said bond, as provided for the original registry. But the same may be discharged from registry by being in like manner transferred to bearer, after which it shall be transferrable by delivery, but may be again and from time to time registered as before. When this bond is registered, the coupons hereto attached shall pass by delivery, as though no registry had been made, but at such registry the unpaid coupons may be surrendered, detached from said bond and cancelled, after which the interest shall be payable only to the registered owner of the bond.

No writing on this Bond, except by an officer of this Company.

Date of Registry. In Whose Name Registered. Transfer Agent.

Jan. 6, 1902.

Cyril Johnson. United States Mortgage & Trust Co.

CALVERT BREWER,
Ass't Treasurer.
CALVERT BREWER,
Secretary.

(Coupon.)

14.

On the first day of July, 1908, The Toledo Railways and Light Company will pay the bearer at the fiscal office of said Company in the City of New York, Twenty \$20 Dollars (\$20) in gold coin, being the semi-annual payment of interest then due on its four per cent (4%) Consolidated First Mortgage Gold Bond of like number herewith.

No. 9520.

FRED S. BORTON,
Secretary American Bank Note Co., N. Y.

49 (Back of above Bond:) 9520. The Toledo Railways and Light Company. \$1,000 4% Consolidated First Mortgage Gold Bond. Principal Due July 1st, 1909. Interest Payable January 1st & July 1st. Principal and Interest Payable in the City of New York. Trustees Certificate. This bond is one of the series of bonds described in the mortgage within referred to. United States Mortgage and Trust Company, Trustee. By W. P. Elliot, Secretary. American Bank Note Company, New York.

50 & 51 [Endorsed:] In the District Court of the United States, for the Southern District of New York. Walter L. Hill and Ralph L. Spotts as Executors &c., of Harford B. Kirk, Deceased, Plaintiffs, against The Toledo Railways and Light Company, De-

defendant. Copy. Affidavit. Kendall & Herzog, Attorneys for Plaintiffs, 233 Broadway, Borough of Manhattan, N. Y. City.

52 *Memorandum of Hough, J., in Motion to Set Aside Service of Summons and Complaint.*

United States District Court, Southern District of New York.

WALTER L. HILL et al., as Executors,
vs.

THE TOLEDO RAILWAYS & LIGHT COMPANY.

Motion to Set Aside Service of Summons and Complaint

Memorandum

The difficulties which have arisen regarding the service of answering and replying affidavits are annoying and indeed distressing.

I do not recollect giving any directions as to the hour at or before which any paper was to be served.

It is of course my desire that all the facts which seem to any counsel important shall be spread upon the records of the Court.

I have therefore concluded to accept as one of the papers in the case the affidavit of Mr. Frueauff, verified October 2, 1914, and I have put it on file.

The plaintiffs may file any replying affidavit or affidavits, and they may do this at any time before 1 P. M. of Saturday next, October 10th.

53 Decision of this motion so far as I am concerned will not, however, wait for any replying affidavit, nor does it depend on anything contained in Mr. Frueauff's answering affidavit.

The exact point is novel, but my opinion about it depends on admitted or incontrovertible facts.

The defendant issued certain bonds and promised to pay those bonds and the interest upon the same in the City of New York.

The contract evidenced by the bonds became, therefore, a New York contract.

Obviously the contract could not be performed,—the admitted debt could not be regularly paid, unless the defendant corporation did business within the State of New York.

It has maintained offices within the State of New York; Mr. Frueauff is one of them.

If, therefore, any action had been begun against this Company (at least in relation to these bonds) on or before July 1, 1909, and service had been effected upon the Vice President of the Company within the State of New York, he being a resident of that State, it seems to me that the service would have been perfect and exactly within Lumbermen's Insurance Co. vs. Meyer, 197 U. S., 407.

ation having been had, and the Court being of opinion that the admitted facts are sufficient to justify decision, it is

56 Ordered: that said motion be and the same hereby is denied. And it is

Further ordered; That the defendant is granted leave to answer or demur herein on or before October 15, 1914; in other respects the order to show cause herein is vacated.

Oct. 7, 1914.

C. M. HOUGH, D. J.

57 [Endorsed:] District Court of the United States for the Southern District of New York. Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, deceased, Plaintiffs, against The Toledo Railways & Light Company, Defendant. Copy. Order. Kendall & Herzog, Attorneys for Plaintiffs, 233 Broadway, Borough of Manhattan, N. Y. City. Filed U. S. District Court S. D. of N. Y., Oct. 7, 1914. Copy Received Oct. 8/14. Frueauff & Robinson.

58

Answer.

In the District Court of the United States for the Southern District of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against

THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendants.

The above named defendant, by Frueauff & Robinson, its attorneys, in answer to the complaint of the plaintiffs, herein respectfully alleges:

First. It denies that it has any knowledge or information as to each and every allegation contained in Paragraphs I, II, VII and VIII of said complaint sufficient to form a belief thereof.

Second. It denies that it has any knowledge or information as to whether the plaintiffs demanded payment of said or any of the twenty-five bonds and coupons, as alleged in Paragraph I of the complaint sufficient to form a belief thereof; and it denies each and every allegation contained in Paragraph X of said complaint.

For a first, separate and complete defence to the alleged cause of action set forth in the complaint, the defendant above named reiterates and realleges the denials hereinbefore set forth and further respectfully alleges:

59 Third. That the bonds described in the complaint herein recite that the payment of the principal and interest of all of said bonds is secured by a certain deed of trust or mortgage of even date of said bonds, duly executed and delivered by said defendant to The United States Mortgage & Trust Company of the City of New York as Trustee, conveying to said Trustee in trust

to secure the payment of all of said bonds with interest equally, all the real and personal property, rights, privileges, grants, contracts, securities, choses in action and franchises of said defendant, including all property and rights thereafter to be acquired by it or consolidated with it, to which mortgage reference is thereby made and each and all the terms, conditions and agreements in which mortgage are thereby made a part of said bonds and said bonds are issued, accepted and held subject to the same.

Fourth. That in Article X of said mortgage it is provided that no holder of any bond or coupon secured thereby shall have any right to institute any suit, action or proceeding for the foreclosure of said indenture or for the execution of any trust thereof without first giving to the Trustee written notice of the fact that default has occurred and continued as provided in said mortgage, nor unless also the holders of twenty-five per cent. (25%) in amount of the then outstanding bonds secured thereby shall have requested the Trustee in writing and shall have afforded it reasonable opportunity, either itself to proceed to exercise the powers granted by said mortgage or to institute such action, suit or proceeding in its own name, nor unless also they shall have offered to the Trustee satisfactory security and indemnity against the costs, expenses and liabilities to be incurred therein or thereby.

60 Fifth. On information and belief that the plaintiffs herein have not given the Trustee written notice of the fact that default has occurred or continued as provided in said bond, nor have the holders of twenty-five per cent. (25%) in amount of the bonds outstanding at the time of said alleged default, so requested the Trustee in writing, nor was there afforded to said Trustee, reasonable opportunity, either itself to proceed to exercise the powers granted in said mortgage or to start such action, suit or proceeding in its own name, nor was said Trustee offered satisfactory security or indemnity against the costs, expenses or liabilities to be incurred therein or thereby.

For a second, separate and complete defence to the alleged cause of action set forth in the complaint, the defendant above named reiterates and realleges the denials hereinbefore set forth and further respectfully alleges:

Sixth. That on or about the first day of November, 1912, a plan of re-organization was formulated in respect of the outstanding securities and obligations of said defendant company. That among said outstanding securities of said defendant company included within the scope of said plan of re-organization, was the series of bonds described in the complaint herein. That by the provisions of said plan of re-organization, it was proposed to organize a new company which was to acquire all the outstanding stock and obligations of the defendant company, the holders of which would consent to said plan, and to issue in exchange therefor, the stock and bonds of the outstanding securities and obligations of the defendant company. That said plan provided for the issuance to the
61 holders of the series of bonds described in the complaint assenting to said plan, the Six Per Cent. Cumulative Pre-

ferred Capital Stock of said new company at a par value equal to the principal amount of the bonds of said holders. That pursuant to said plan, an agreement of re-organization was entered into between J. R. Nutt, Norman B. Ream, C. Ledyard Blair, John Sherwin, H. P. McIntosh, William B. Hale, William E. Hutton and William H. Netherland, constituting the Re-organization Committee, parties of the first part, the holders of said securities and obligations of the defendant company, parties of the second part, and The New York Trust Company of the City of New York, party of the third part; that approximately ninety-five per cent. (95%) of the holders of the bonds of the series described in the plan, assented to said plan of reorganization and became parties of said Re-organization Agreement as provided by the terms thereof and received the Six Per cent. Cumulative Preferred Capital Stock of said new company which was thereafter formed under the name of Toledo Traction, Light & Power Company in exchange for the bonds so held by them; that, as provided by said Re-organization Agreement as modified, the right to deposit bonds of the series mentioned in the complaint and receive in exchange therefor the Six Per cent. Cumulative Preferred Capital Stock of said Toledo Traction, Light & Power Company, expired February 1, 1913.

Seventh. That after the completion of said reorganization, pursuant to the terms of said agreement, the said Toledo Traction, Light & Power Company offered to the holders of the bonds of the series described in the complaint, who had not become parties to said re-organization agreement, to issue in exchange for the
62 bonds so held by them the Six Per Cent. Cumulative Preferred Capital Stock of Toledo Traction, Light & Power Company on the same basis as provided in said Re-organization Agreement.

Eighth. On information and belief, that the plaintiffs above named accepted said offer and agreed to transfer the bonds held by them or subject to their control which are the said bonds described in the complaint herein, to said Toledo Traction, Light & Power Company, in exchange for said Six Per Cent. Cumulative Preferred Capital Stock. That thereafter said plaintiffs herein failed to so deliver their shares pursuant to said agreement and have ever since failed so to do although said Toledo Traction, Light & Power Company has been ready and willing and still offers to issue in exchange for said shares its Six Per Cent. Cumulative Preferred Capital Stock to an amount equal to the principal amount of said bonds.

For a third, separate and complete defence to the alleged cause of action set forth in the complaint, the defendant above named reiterates and realleges the denials hereinbefore set forth and further respectfully alleges:

Ninth. That the plaintiffs above named attempted to institute this action and to serve process in the State of New York upon the defendant herein by delivering within said state a copy of the summons and complaint to one Frank W. Frueauff, a Vice-President and Director of the Company, who resides therein. That at the time of the attempted institution of this action, Toledo Railways

& Light Company owned no property in New York State, maintained no office and transacted no business herein. Upon information and belief, that the attempted service of said process was invalid and ineffective and conferred no jurisdiction upon this Court
 63 over the person of the defendant and that by reason thereof, this Court has no jurisdiction over the person of the defendant in this action.

Wherefore, defendant demands judgment that the complaint be dismissed with the costs and disbursements of this action.

FRUEAUFF & ROBINSON,
Attorneys for Defendant.

Office & Post Office Address, No. 60 Wall Street, Borough of Manhattan, New York City.

64 STATE OF NEW YORK,
County of New York, ss:

FRANK W. FRUEAUFF, being duly sworn, deposes and says:

That he is Vice-President of The Toledo Railways & Light Company, the defendant above named; that he has read the foregoing answer and knows the contents thereof and that the same is true to his own knowledge except as to matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true; that the reason why this verification is made by deponent and not by the defendant is because the defendant is a foreign corporation and deponent, an officer thereof, to wit, the Vice-President.

FRANK W. FRUEAUFF.

Sworn to before me this 10th day of October, 1914.

THOMAS H. FAIR,
Notary Public New York County, No. 1054;
New York Register No. 5104.

65 [Endorsed:] In the District Court of the United States, for the Southern District of New York. Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will & Testament of Harford B. Kirk, Deceased, Plaintiffs, against The Toledo Railways & Light Company, Defendant. Answer. Frueauff & Robinson, Attorneys for Defendant. Office and P. O. Address, 60 Wall Street, Borough of Manhattan, New York. Copy of the within answer received this 10th day of October, 1914. Kendall & Herzog, Attorneys for Plaintiff. Filed U. S. District Court, S. D. of N. Y., October 13, 1914.

66

Extract from Minutes of Trial.

At a Stated Term of the District Court of the United States, for the Southern District of New York, Held at the United States Court-rooms, in the U. S. Court-house and Post-Office Building, in the Borough of Manhattan, City of New York, on the 18th Day of June, in the Year of Our Lord One Thousand Nine Hundred and Fifteen.

Present: Honorable William I. Grubb, District Judge.

L. 13-100.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased,
vs.

THE TOLEDO RAILWAYS & LIGHT COMPANY.

Now come the plaintiffs by Paul M. Herzog their attorney and moves the trial of this cause. Likewise comes the defendant by its attorney Watson B. Robinson, and objects to the Court proceeding with the cause for want of jurisdiction of the person of the defendant. Overruled. Thereupon a jury is duly empaneled and sworn and the cause proceeds to trial. Defendant's attorney states that he will take no part in the trial except to object to the jurisdiction. At the close of the testimony, plaintiff's attorney moves for a direction of a verdict. By direction of the Court verdict for the plaintiff for \$35,987.00.

Defendant excepts.

An extract from the minutes.

ALEX. GILCHRIST, JR., *Clerk.*

67

Judgment.

United States District Court, Southern District of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against

THE TOLEDO RAILWAYS AND LIGHT COMPANY, Defendant.

The above entitled action having duly come on for trial at a Stated Term of this Court in and for the Southern District of New York, at the Court House, Borough of Manhattan, City of New York, on the 18th day of June, 1915, before the Honorable William I. Grubb and a jury, and the above parties having appeared, the plaintiffs by Kendall & Herzog, their attorneys, and the defendant by Frueauff & Robinson, Esqs., its attorneys, and the issues having been duly tried and the jury having, under the direction of the Court,

returned a verdict in favor of the plaintiffs, and against the defendant for the sum of Thirty-five thousand nine hundred eighty-seven dollars (\$35,987), and the costs of the plaintiffs having been duly taxed in the sum of Forty-nine and 5/100 dollars (\$49.05).

Now, on motion of Kendall & Herzog, attorneys for the plaintiffs, it is

Adjudged that the plaintiffs Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, deceased, recover of the defendant, The Toledo Railways and Light Company, the sum of Thirty-five thousand nine hundred eighty-seven dollars, (\$35,987), together with the sum of Forty-nine and 5/100 dollars, costs as taxed, amounting in all to the sum of thirty-six thousand and thirty-six and 5/100 dollars, and that the said plaintiffs have execution therefor.

Judgment signed and entered this 26th day of June, 1915.

ALEX. GILCHRIST, JR., Clerk.

69 [Endorsed:] United States District Court, Southern District of New York. Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs, against The Toledo Railways and Light Company, Defendant. Copy. Judgment. Kendall & Herzog, Attorneys for Plaintiffs, 233 Broadway, Borough of Manhattan, N. Y. City. Filed June 26, 1915. U. S. District Court, S. D. of N. Y.

70

A Stipulation.

United States District Court, Southern District of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against

THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

It is hereby stipulated and agreed, by and between the attorneys for the parties hereto, that plaintiffs' Exhibit No. 1 consisted of original Letters Testamentary, issued by the Surrogates' Court in and for the County of New York, on September 5, 1907 to Walter L. Hill and Ralph L. Spotts, Executors, granting to said executors the administration of all and singular the goods, chattels and credits of Harford B. Kirk, deceased.

It is further stipulated and agreed that since the commencement of this action and before trial thereof Walter L. Hill, one of the executors above named, died, but, nevertheless, this writ of error is, by consent of the parties, being prosecuted under the title of the action as originally instituted and as above set forth.

It is further stipulated and agreed that plaintiffs' Exhibit No. 2 consisted of twenty-five (25) Four Per Cent Consolidated First Mortgage Gold Bonds of The Toledo Railways & Light Company, in the principal amount of one thousand dollars (\$1,000)
71 each, dated August 10, 1901, numbered 9126, 9128, 9519-9821, 10057-10064, 10331-10332, 10475-10484, and to

which were attached coupons maturing July 1, 1908, January 1, 1909 and July 1, 1909. All of said bonds are identical in form (except that each bear a distinctive number), said form being as follows:

"United States of America,
State of Ohio.

No.—.

\$1,000.

The Toledo Railways and Light Company.

Four Per Cent. Consolidated First Mortgage Gold Bond.

Know all men by these presents, that The Toledo Railways and Light Company, a corporation created and existing under the laws of the State of Ohio, for value received, is indebted to the bearer hereof, or, if this bond be registered, then to the registered owner hereof, in the sum of one thousand dollars (\$1,000), which it promises to pay on the first day of July, A. D. one thousand nine hundred and nine (A. D. 1909), at the fiscal office of said Company in the City of New York, in gold coin of the United States of America of or equivalent to the present standard of weight and fineness, to the bearer hereof, or to the registered owner of this bond (if registered), with interest thereon from and after the first day of July, A. D. one thousand nine hundred and one (A. D. 1901), at the rate of four per cent. (4%) per annum payable in the gold coin aforesaid, semi-annually on the first days of January and July in each year at the fiscal office of said Company in the City of New York, without deduction for any tax or taxes which said Company may be required to pay thereon, or retain therefrom under any present or future law of the United States of America, or of any State, County or municipality thereof, upon presentation and surrender of the interest coupons hereto attached as they respectively become payable.

This bond is one of a series of twelve thousand (12,000) bonds, numbered consecutively from one (1) to twelve thousand (12,000), both inclusive, all of like tenor, amount, date and effect, bonds numbers ten thousand and one (10,001) to twelve thousand (12,000), both inclusive, being reserved as provided in said mortgage, to which reference is hereby made, for future extensions, betterments and improvements. The payment of the principal and interest of all of said bonds is secured by a certain trust deed or mortgage of even date herewith, duly executed and delivered by said The Toledo Railways and Light Company of Toledo, Ohio, to the United States Mortgage and Trust Company of the City of New York, as Trustee, conveying to said Trustee in trust to secure the payment of all of said bonds, with interest, equally, all the real and personal property, rights, privileges, grants, contracts, securities, choses in action and franchises of said Company, including all property and rights thereafter to be acquired by it or consolidated with it, to which mortgage reference is hereby made, and each and all of the terms, conditions and agreements in which, including

the right to declare the principal due upon six months' default as in said mortgage provided, are hereby made a part hereof, and this bond is issued, accepted and held subject to the same.

The holder hereof shall have no recourse to the liability of the incorporators or the present or future stockholders of said Company, or of any successor Company, for the payment of the principal and interest of this bond or any part thereof, or the performance of any of the covenants or agreements in said mortgage contained, but hereby expressly waives the same. This bond shall not be obligatory until authenticated by the certificate endorsed hereon of the United States Mortgage and Trust Company of New York City, Trustee, and is redeemable at any time at 102½ and interest, in the manner provided in said mortgage. This bond shall pass by delivery, unless registered.

In testimony whereof, said The Toledo Railways and Light Company has caused these presents to be signed by its President or Vice-President and Secretary, and its corporate seal to be hereto affixed and the accompanying sixteen (16) interest coupons to be authenticated by the fac simile signature of its Secretary on this 10th day of August, one thousand nine hundred and one.

THE TOLEDO RAILWAYS AND LIGHT
COMPANY,

By ALBION E. LANG, *President.*

[CORPORATE SEAL.] FRED S. BARTON, *Secretary.*

(*Form of Coupon.*)

No.—

\$20.00.

On the first day of — The Toledo Railways and Light Company will pay the bearer at the fiscal office of said Company in the City of New York Twenty Dollars (\$20.00) in gold coin, being the semi-annual payment of interest then due on its four per cent. (4%) Consolidated First Mortgage Gold Bond of like number herewith.

FRED S. BARTON, *Secretary.*

(*Trustee's Certificate.*)

This bond is one of the series of bonds described in the mortgage within referred to.

UNITED STATES MORTGAGE AND
TRUST COMPANY, *Trustee,*

By W. D. ELLIOTT, *Secretary.*"

73 The following endorsements appear on the back of said bonds:

"The Toledo Railways & Light Company \$1,000 4% Consolidated First Mortgage Gold Bond. Principal due July 1st, 1909. Interest payable January 1st & July 1st. Principal and interest payable in the City of New York."

"American Bank Note Company, New York."

"Registration. This bond may be registered in the owner's name on books kept by said United States Mortgage and Trust Company at its office in the City of New York, such registry being noted on the bond by said Trust Company's Secretary or Transfer Agent, after which no transfers shall be valid, unless made on the Trust Company's books by the registered owner in person, or by attorney in fact thereunto duly authorized in writing, and such transfer noted on said bond, as provided for the original registry. But the same may be discharged from registry by being in like manner transferred to bearer, after which it shall be transferable by delivery, but may be again and from time to time registered as before. When this bond is registered the coupons hereto attached shall pass by delivery, as though no registry had been made, but at such registry the unpaid coupons may be surrendered, detached from said bond and cancelled, after which the interest shall be payable only to the registered owner of the bond."

"No writing on this bond except by an officer of this Company.

Date of registry. In whose name registered. Transfer agent.

It is further stipulated and agreed that all of said bonds are duly signed and countersigned.

It is further stipulated and agreed that this stipulation may be printed in the record on this writ of error in place of printing the exhibits in full.

Dated, New York, July 10th, 1915.

KENDALL & HERZOG,

Attorneys for Plaintiff.

FRUEAUFF & ROBINSON,

Attorneys for Defendant.

74 [Endorsed:] United States District Court, Southern District of New York. Walter L. Hill and Ralph L. Spotts as Executors of the Last Will and Testament of Harford B. Kirk, deceased, Plaintiffs, against The Toledo Railways & Light Company, Defendant. Stipulation. Filed Jul. 14 1915. U. S. District Court, S. D. of N. Y.

75 *Certificate as to Question of Jurisdiction.*

In the District Court of the United States, for the Southern District of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,

AGAINST

THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

Certificate by the Honorable William I. Grubb, one of the Judges of the District Court of the United States, for the Southern District

of New York, Second Circuit, pursuant to Section 238 of the Judicial Code.

I, William I. Grubb, one of the Judges of the District Court of the United States, for the Southern District of New York, Second Circuit, hereby certify to the Supreme Court of the United States that the issues in the above entitled action came on for trial, in the above entitled Court, on the 18th day of June, 1915.

That prior to the trial of said action the defendant duly moved at a term of the District Court for an order quashing the service of the summons herein and dismissing this action for want of personal jurisdiction over the defendant, and that on the 7th day of October, 1914, an order was entered in the said District Court by direction of Honorable Charles M. Hough, District Judge, denying said motion to quash service and dismiss said action for want of personal jurisdiction over the defendant.

76 That at the opening of the trial hereinbefore mentioned, the defendant duly renewed its motion to quash service herein and to dismiss said action for want of personal jurisdiction, and said motion as thus renewed was denied upon authority of said prior order entered by direction of District Judge Hough and because made after answer filed on the merits. That the attorney for the defendant thereupon stated that he would take no part in the trial except to object to the Court's jurisdiction, and at proper subsequent stages of the trial renewed said motion, which was denied.

That thereafter, at the close of the plaintiffs' case, the Court directed the jury to return a verdict in favor of the plaintiffs and against the defendant, in the sum of thirty-five thousand nine hundred and eighty-seven dollars (\$35,987), pursuant to which direction a verdict was so returned, and a final judgment was thereafter and on the 26th day of June, 1915 entered in favor of the plaintiffs and against the defendant in the sum of thirty-six thousand and thirty-six and 5/100 dollars (\$36,036.05).

I further certify that the defendant duly filed in this Court its petition praying that a writ of error may issue out of the Supreme Court of the United States, under the provisions of Section 238 of the Judicial Code to review said judgment, and an order allowing such writ of error has been duly entered.

I, therefore, in accordance with the provisions of Section 238 of the Judicial Code, being Judiciary Act of Congress of the United States, approved March 3, 1911, do hereby certify to the Supreme Court of the United States, that the jurisdiction of this Court over the person of the defendant The Toledo Railways & Light
77 Company is in issue, and that the following question of jurisdiction is certified to the Supreme Court of the United States for decision:—

The question whether the defendant by reason of its issuing certain bonds, the principal whereof was payable in the City of New York, in 1909, at the fiscal office of the Company in said city, is doing business within the State of New York, so as to be amenable to service of process within said state; whether the defendant by reason of its issuing bonds, the principal whereof was payable in

the City of New York in 1909 at the fiscal office of the Company in said city, should be conclusively presumed to have maintained said fiscal office in the City of New York until said bonds were paid, and thereby rendered itself amenable to service of process within the State of New York, made by leaving the same with a vice-president of the Company, residing within the State of New York but not representing the defendant within the State of New York in respect to any business conducted in said state, even though the Company, at the time the action was brought, maintained no office in the State of New York, owned no property in New York State, transacted no business in said state and was not represented in said state by any person, firm or corporation; whether the motion of the defendant to quash the service of summons attempted to be made herein and to dismiss the cause for want of jurisdiction over the person of the defendant should have been granted upon all the facts contained in the record and whether the motion of the defendant to quash the service of the summons attempted to be made herein and to dismiss the cause for want of jurisdiction over the person of the defendant when said motion was renewed at the opening of the trial should have been granted in view of the fact that the defendants had filed an answer on the merits, even though said answer set up as a defense the lack of the Court's jurisdiction over the person of the defendant. Dated at New York, July 1st, 1915.

W. I. GRUBB,

United States District Judge.

79 [Endorsed:] In the District Court of the United States, for the Southern District of New York. Walter L. Hill and Ralph L. Spotts, etc., Plaintiffs, against The Toledo Railways & Light Company, Defendant. Copy. Certificate. Frueauff & Robinson, Attorneys for Defendant. Office and P. O. Address, 60 Wall Street, Borough of Manhattan, New York. Filed Jul- 9, 1915. U. S. District Court S. D. of N. Y.

80 *Petition for Writ of Error.*

In the District Court of the United State for the Southern District of New York.

At Law.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against

THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant,

Now comes The Toledo Railways & Light Company, defendant herein, and says: That on the 26th day of June, 1915, the District Court of the United States, for the Southern District of New York, entered a judgment herein in favor of the plaintiffs and against this

defendant, in which judgment, and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States, for the correction of errors so complained of, and that a transcript of the material portions of the record, proceedings and papers in this cause, as specified under Rule Eighth of the Supreme Court, duly authenticated, may be sent to the said Supreme Court of the United States.

FRUEAUFF & ROBINSON,

Attorneys for Defendant.

Office and P. O. Address, No. 60 Wall St., Borough of Manhattan, City of New York.

81 [Endorsed:] L. 13-100. In the District Court of the United States, for the Southern District of New York. Walter L. Hill and Ralph L. Spotts, etc., Plaintiffs, against The Toledo Railways & Light Company, Defendant. Copy. Petition for Writ of Error. Frueauff & Robinson, Attorneys for Defendant. Office and P. O. Address, 60 Wall Street, Borough of Manhattan, New York. Filed U. S. District Court. S. D. of N. Y., July 2, 1915.

82 *Order Allowing Writ of Error and Supersedeas.*

In the District Court of the United States, for the Southern District of New York.

At Law.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against

THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

This 1st day of July, 1915 comes the defendant, by Frueauff & Robinson, its attorneys, and files herein and presents to the Court its petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by it, praying also that a transcript of the material portions of the record, proceedings and papers upon which the judgment herein was rendered, as specified under Rule VIII of the Supreme Court, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises. Upon consideration whereof the Court does allow the writ of error upon the defendant's giving bond according to law, in the sum of thirty-eight thousand five hundred dollars (\$38,500), which shall operate as a supersedeas bond.

W. I. GRUBB,
District Judge.

83 [Endorsed:] L. 13-100. In the District Court of the United States, for the Southern District of New York. Walter L. Hill and Ralph L. Spotts, etc., Plaintiffs, against The Toledo Railways & Light Company, Defendant. Copy. Order Allowing Writ of Error and Supersedeas. Frueauff & Robinson, Attorneys for Defendant. Office and P. O. Address, 60 Wall Street, Borough of Manhattan, New York. Filed U. S. District Court S. D. of N. Y., July 2, 1915.

84

Assignments of Error.

In the District Court of the United States, for the Southern District of New York.

At Law.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

Now comes the said defendant The Toledo Railways & Light Company, by Frueauff & Robinson, its attorneys, and says that in the record, proceedings and orders and in the final decree and judgment entered thereon, whereby the plaintiffs recovered judgment for the amount demanded in their complaint, there is manifest error, and that the defendant has been denied its just rights by said proceedings and decree; and the defendant hereby assigns and sets out the following errors, namely:

1. The court erred in holding that the defendant by reason of its issuing certain bonds, the principal whereof is payable in the City of New York, in 1909, at the fiscal office of the Company in said city, is doing business within the State of New York, so as to be amenable to service of process within said state.

2. The court erred in holding that the defendant by reason of its issuing bonds, the principal whereof was payable in the City of New York in 1909 at the fiscal office of the Company in said City, should be conclusively presumed to have maintained said fiscal

85 office in the City of New York until said bonds were paid, and thereby rendered itself amenable to service of process within the State of New York, made by leaving the same with a vice-president of the Company, residing within the State of New York but not representing the defendant within the State of New York in respect to any business conducted in said state, even though the Company, at the time the action was brought, maintained no office in the State of New York, owned no property in New York State, transacted no business in said state and was not represented in said state by any person, firm or corporation.

3. The Court erred in denying the motion of the defendant to quash the service of summons attempted to be made herein and to dismiss the cause for want of jurisdiction over the person of the defendant.

4. The Court erred in denying the motion of the defendant to quash the service of summons attempted to be made herein and to dismiss the cause for want of jurisdiction over the person of the defendant when said motion was renewed at the opening of the trial, on the ground that the defendants had filed an answer on the merits, even though said answer set up as a defense the lack of the Court's jurisdiction over the person of the defendant.

5. The Court erred in entering a judgment against the defendant which, if enforced against the defendant in accordance with its terms, would, by reason of the absence of personal jurisdiction over the defendant, constitute a taking of its property without due process of law.

Dated, New York, July 1st, 1915.

FRUEAUFF & ROBINSON,
Attorneys for Defendant.

Office and P. O. Address, 60 Wall Street, Borough of Manhattan, City of New York.

86 [Endorsed:] L. 13-100. In the District Court of the United States for the Southern District of New York. Walter L. Hill and Ralph L. Spotts, etc., Plaintiffs, against The Toledo Railways & Light Company, Defendant. Copy. Assignment of Errors. Frueauff & Robinson, Attorneys for Defendant. Office and P. O. Address, 60 Wall Street, Borough of Manhattan, New York. Filed U. S. District Court S. D. of N. Y., July 2, 1915.

87 District Court of the United States of America for the Southern District of New York, in the Second Circuit.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs Respondents,

against

TOLEDO RAILWAY & LIGHT COMPANY, Toledo, Ohio, Defendant-Appellant.

Bond on Writ of Error.

Know all men by these presents, That Toledo Railway & Light Company of Toledo, Ohio, as principal, and National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, are held and firmly bound unto the above named Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, deceased, in the sum of Thirty-eight thousand, five hundred (\$38,500) Dollars to be paid to the said Walter L. Hill and Ralph L. Spotts, as executors of the Last Will and Testament of Harford B. Kirk, deceased, for the payment of which well and truly to be made, said principal and surety bind themselves, their heirs, executors, ad-

ministrators and assigns, jointly and severally, firmly by these presents. Sealed and dated the 1st day of July, 1915.

Whereas, the above named Toledo Railway & Light Company of Toledo Ohio, has prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled suit, in the District Court of the United States for the Southern District of New York.

Now, Therefore, the condition of this obligation is such, that if the above named Toledo Railway & Light Company of Toledo, Ohio, shall prosecute its writ of error to effect, and answer all damages and costs if it fails to make said writ good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

TOLEDO RAILWAY & LIGHT CO.,
By FRANK W. FRUEAUFF, *Vice-Pres't.*
NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
[CORPORATE SEAL.] *Resident Vice-President.*

Attest:

[CORPORATE SEAL.] E. M. McCARTHY,
Resident Assistant Secretary.

88 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 1st day of July, 1915, before me personally came William A. Thompson, known to me to be the resident Vice-President of National Surety Company, the corporation described in and which executed the foregoing Bond of Toledo Railway & Light Company as surtey and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly incorporated under the laws of the State of New York, that said Company has complied with the provisions of the Act of Congress of August 13, 1894, that the seal affixed to the within Bond of Toledo Railway & Light Company is the corporate seal of said National Surety Company, and was thereto affixed by authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as resident Vice-President of said Company, and that he is acquainted with E. M. McCarthy and knows him to be the resident Assistant Secretary of said Company; and that the signature of said E. M. McCarthy subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and

liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of three million, five hundred thousand (\$3,500,000) dollars.

WM. A. THOMPSON.
(Deponent's Signature.)

Signed, sworn to, and acknowledged before me this 1st day of July, 1915.

[NOTARIAL SEAL.]

H. E. EMMETT,
Notary Public.

STATE OF NEW YORK,
County of New York, ss:

On this 9th day of July, 1915, before me personally came Frank W. Frueauff; to me known, who, being by me duly sworn, did depose and say that he resides in Garden City, N. Y.; that he is the Vice-President of The Toledo Rys. & Lt. Co., the corporation described in and which executed the foregoing instrument; that he knows the seal of the said corporation; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name to the said instrument by like order

[NOTARIAL SEAL.]

THOMAS H. FAIR,
Notary Public.

[Endorsed:] District Court of United States Southern District of New York Walter L. Hill and Ralph L. Spotts as Executors of the Last Will and Testament of Harford B. Kirk, deceased, Plaintiffs-Respondents, against Toledo Railway & Light Company, Toledo, Ohio, Defendant-Appellant. Bond on Appeal. Surety National Surety Company, Frueauff & Robinson, 60 Wall Street, Attorney for Defendant-Appellant. I approve of the *written* Bond, and of the sufficiency of the surety thereon. Wm. I. Grubb, District Judge.

89 *Stipulation under Rule 8 of the Supreme Court.*

In the District Court of the United States for the Southern District of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
against
THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

Stipulation.

It is hereby stipulated and agreed, by and between Kendall & Herzog, attorneys for the plaintiffs herein, and Frueauff & Robinson, attorneys for defendant herein, that the complete record in this ac-

tion on appeal to the honorable Supreme Court of the United States, for the purpose of determining the jurisdiction of the District Court of the United States in this action over the person of the defendant, shall consist of the following papers:

1. Summons and complaint.
2. Petition, order and bond on removal.
3. Order to show cause why service of summons should not be denied and set aside, together with one affidavit by Frank R. Coates, two affidavits by Frank W. Frueauff, one affidavit by Robert Burns, in support of said motion, and two affidavits by Paul M. Herzog in opposition to said motion.
4. Opinion of Judge Charles M. Hough relative to said motion.
5. Order denying said motion.
6. Answer of defendant.
7. Clerk's extracts of minutes and exhibits.
8. Judgment.

KENDALL & HERZOG,
Attorneys for Plaintiffs.
FRUEAUFF & ROBINSON,
Attorneys for Defendants.

90 [Endorsed:] United States District Court, Southern District of New York. Walter L. Hill & ano., Pl'ff- v. The Toledo R'ways & Light Co., Def'ts. Stipulation. Filed Jul- 7 , 1915. U. S. District Court, S. D. of N. Y.

91 *Citation.*

By the Honorable William I. Grubb, One of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, deceased, Greeting:

You are hereby cited and admonished to be and appear before a Supreme Court of the United States, to be holden at Washington, D. C., on the 29th day of July, 1915, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the Southern District of New York, wherein The Toledo Railways & Light Company is plaintiff-in-error and you are defendants-in-error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above mentioned, this 1st day of July, in the year of our Lord one thousand nine hundred and fifteen, and of the independence of the United States, the one hundred and thirty-ninth.

W. I. GRUBB,
Judge of the District Court of the United States, for the Southern District of New York, in the Second Circuit.

92 [Endorsed:] L. 13-100. United States Supreme Court. The Toledo Railways & Light Company, Plaintiff in Error (Defendant below), against Walter L. Hill and Ralph L. Spotts, as Executors of the Last Will and Testament of Harford B. Kirk, deceased, Defendants in error (plaintiffs below). (Copy.) Citation. Frueauff & Robinson, Attorneys for Plaintiff in Error. Office and P. O. Address, 60 Wall Street, Borough of Manhattan, New York. Filed U. S. District Court, S. D. of N. Y., July 14, 1915. Service of a copy of the within Citation is hereby admitted this 13th day of July, 1915. Kendall & Herzog, Attorneys for Defendants in Error.

93 *Stipulation on Appeal Record.*

United States District Court, Southern District of New York.

WALTER L. HILL and RALPH L. SPOTTS, as Executors of the Last Will and Testament of Harford B. Kirk, Deceased, Plaintiffs,
vs.

THE TOLEDO RAILWAYS & LIGHT COMPANY, Defendant.

Stipulation as to Correctness of Record.

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated July 10, 1915.

KENDALL & HERZOG,
Attorneys for Plaintiffs.
FRUEAUFF & ROBINSON,
Attorneys for Defendant.

94 [Endorsed:] L. 13-100. United States District Court, Southern District of New York. Walter L. Hill and Ralph L. Spotts, as Executors, etc., Plaintiffs, vs. The Toledo Railways & Light Company, Defendants. Stipulation as to Correctness of Appeal Record. Frueauff & Robinson, Attorneys for defendant, 60 Wall Street, Borough of Manhattan, City of New York.

95 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss:

WALTER L. HILL and RALPH L. SPOTTS, as Executors, etc.,
vs.
THE TOLEDO RAILWAYS & LIGHT COMPANY.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the

record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 20th day of July in the year of our Lord one thousand nine hundred and fifteen and of the Independence of the said United States the one hundred and fortieth.

[Seal District Court of the United States, Southern District
of N. Y.]

ALEX. GILCHRIST, JR., *Clerk.*

[10-cent U. S. revenue stamp—cancelled. A. G., Jr.]

96 [Endorsed:] Supreme Court of the United States. L.
13 100. The Toledo Railways & Light Company, Plaintiff in
error, against Walter L. Hill and Ralph L. Spotts, as Executors of the
Last Will and Testament of Harford B. Kirk, deceased, Defendants
in error. In error to the District Court of the United States for
the Southern District of New York. Transcript of Record. Frue-
auff & Robinson, Counsellors-at-Law, 60 Wall Street, New York,
Attorneys for Plaintiff-in-Error.

Endorsed on cover: File No. 24,853. S. New York, D. C. U. S.
Term No. 570. The Toledo Railways & Light Company, plaintiff
in error, vs. Walter L. Hill and Ralph L. Spotts, as Executors of
the Last Will and Testament of Harford B. Kirk, deceased. Filed
July 24th, 1915. File No. 24,853.

Supreme Court of the United States

October Term, 1916

No. 700

THE TOLEDO RAILWAY & LIGHT COMPANY

Plaintiff in Error,

**WALTER L. HILL and RALPH L. SPOTTS, as Executors
of the last Will and Testament of Harford B. Kirk,
deceased,**

Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO AMEND RECORD.

KENDALL & HENZON,

Attorneys for Defendant in Error.

HOWARD S. GANE, of Counsel.

Office & Post Office Address,

No. 245 Broadway,

Borough of Manhattan,

City of New York.

Supreme Court of the United States

THE TOLEDO RAILWAYS & LIGHT
COMPANY,

Plaintiff-in-Error,

against

WALTER L. HILL and RALPH L.
SPOTTS, as Executors of the
Last Will and Testament of
Harford B. Kirk, deceased,
Defendants-in-Error.

Now come the defendants-in-error and move the court for an order directing that the affidavits of Alexander Reissman, verified February 27th, 1917, and of Paul M. Herzog, verified February 27th, 1917, and the recital of the occurrences upon the said trial appearing in the said affidavits, be annexed to and made a part of the transcript of the record herein with the same force and effect as though they had been set forth in and annexed to the certificate of jurisdiction appearing on the thirty-sixth page thereof as setting forth the facts upon which the said certificate was based, and had been made a part of the record as originally certified; and for such other relief in the premises as the court may deem just.

Dated, New York, February 27th, 1917.

Alexander Reissman & Paul M. Herzog
Attorneys for Defendants-in-Error,
Harford B. Kirk of Counsel,

~~Office & Post Office Address,~~

233 Broadway,

Borough of Manhattan,

City of New York.



Supreme Court of the United States

THE TOLEDO RAILWAYS & LIGHT
COMPANY,

Plaintiff-in-Error,

against

WALTER L. HILL and RALPH L.
SPOTTS, as Executors of the
Last Will and Testament of
Harford B. Kirk, deceased,
Defendants-in-Error.

2

PLEASE TAKE NOTICE that upon the annexed affidavits of Alexander Reissman, verified February 27th, 1917, and Paul M. Herzog, verified February 27th, 1917, the undersigned will move this Court at the opening of the session thereof, to be held at the Capitol in the City of Washington on the 6th day of March, 1917, or as soon thereafter as counsel can be heard, for an order directing that the said affidavits and the recital of the occurrences upon the said trial appearing in the said affidavits be annexed to and made a part of the transcript of record herein with the same force and effect as though they had been set forth in and annexed to the certificate of jurisdiction appearing on the 36th page thereof as setting forth the facts upon which

3

- 4 the said certificate was based and had been made a part of the record as originally certified, and that they will further move for such relief in the premises as to the Court may seem just.

Dated, New York, February 27 ~~1917~~, 1917.

KENDALL & HERZOG,
Attorneys for Defendants-in-Error,
HOWARD S. GANS, of Counsel,
Office & Post Office Address,
233 Broadway,
Borough of Manhattan,
City of New York.

SUPREME COURT
OF THE UNITED STATES.

7

THE TOLEDO RAILWAYS & LIGHT
COMPANY,
Plaintiff-in-Error,

against

WALTER L. HILL and RALPH L.
SPOTTS, as Executors of the
Last Will and Testament of
Harford B. Kirk, deceased,
Defendants-in-Error.

8

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss. :

ALEXANDER REISSMAN, being duly sworn, says that he is one of the stenographers designated by the District Court of the United States for the Southern District of New York.

That he was present at the trial of the above-named cause on the 18th day of June, 1915, from the beginning of the said trial to the end thereof, and took the stenographic minutes thereof. That he recorded in the said minutes everything that was said upon the said trial by the Court and the several counsel and witnesses.

That the counsel for the defendant, The Toledo Railways & Light Company, participated in the said trial by making the statements appearing after his name in the transcription from the minutes herein-

9

10 below set forth, and to that extent and that extent only, and that he made no statements other than those hereinafter set forth. That the statements and rulings of the Hon. William I. Grubb appearing after his name in the said transcription of the minutes were made by him in response to the said statements of the defendant's counsel, without any statements on behalf of the counsel for the plaintiffs in said action.

That the following is a true transcript of my stenographic minutes of said statements and occurrences:

11 That immediately after the impaneling and swearing of the jury, Mr. Robinson, the counsel for the defendant (plaintiff-in-error), addressed the Court as follows:

"Mr. Robinson: If your Honor please, the defendant appears specially and has heretofore moved this Court for an order to deny and quash the service of the summons and complaint and to dismiss this action upon the ground that the defendant is a foreign corporation organized under the Laws of the State of Ohio, has no office in the State of New York, has no property in the State of New York, and does no business in the State of New York, and is not amenable to the process of the court of this jurisdiction.

12 This motion, if the Court please, was brought on before Judge Hough on the affidavits of Frank W. Frueauff, Frank R. Coates and Robert Burns, all verified September 11th, 1914, and was opposed by the affidavit of Paul M. Herzog, verified October 2nd, 1914. Judge Hough denied the motion, and in his opinion it appears from the last paragraph, and I quote

from his opinion, 'The motion to set aside the service is denied and an order embodying such denial and fixing a time for answer has been entered by me,' and in conformity with that opinion the Judge entered his own order. For that reason, if the Court please, the defendant asks to have this exception to the ruling of Judge Hough upon that application noted upon the record at this time because this is the first opportunity that the defendant has had to present its exception to that order. Therefore, if the Court please, the defendant now renews its motion to quash the service of the summons and complaint." 13

That thereupon the following colloquy took place between the said counsel and the Court, and the Court made the ruling therein set forth: 14

"The Court: But you filed an answer, did you not?

Mr. Robinson: We were compelled to file an answer.

The Court: But, as I understand it, you cannot move the Court to quash the service after you have filed an answer.

Mr. Robinson: We set that up as a defense. I understand that is the practice in this District and we are following the record that has gone to the United States Supreme Court. I don't know that your Honor is bound by the decision of Judge Hough, but under the practice here there is no other way. 15

The Court: You have already moved to quash the service of the summons and complaint, then you have filed an answer, and it seems to me it is too late again to move the Court to quash the service. In other words, as I under-

16 stand it, this is a motion made to quash the service after the appearance in a case and a general answer.

Mr. Robinson: Well, as long as your Honor will deny the motion anyway——

The Court: I am not passing on the correctness of the original ruling, but it seems to me that when you make a motion to quash the service after filing an answer it is too late; therefore, I will overrule your motion.

Mr. Robinson: And the defendant excepts.

The Court: Of course, as to the exception to Judge Hough's motion, I have nothing to do with that.

17 Mr. Robinson: And your Honor will allow me an exception?

The Court: Yes.

Mr. Robinson: Now, I would like to place the motion more formally upon the record than I have done.

The Court: I will overrule the motion to quash the service because it is too late.

18 Mr. Robinson: The defendant moves to quash the service of the summons and complaint herein and to dismiss this action on the ground that the attempted service of the summons and complaint herein on the defendant corporation, by delivering a copy of the same to Frank W. Frueauff, an officer thereof, in the City, County and State of New York, was not sufficient to confer on this Court jurisdiction over the person of the defendant and was not due service on the said defendant corporation inasmuch as the said defendant corporation was organized under the Laws of the State of Ohio, maintains no office in New York State, does no business and owns no property therein,

and did not at the time of the service of said 19
summons.

This motion, if the Court please, is made on the affidavits heretofore filed, upon which the order of Judge Hough was made and entered herein, dated October 7th, 1914, and the defendant respectfully excepts to your Honor's ruling.

The Court: I overrule the motion, and you may have an exception, on the ground that it comes too late and there having been an answer filed on the merits.

Mr. Robinson: And the defendant will take no part in this trial other than to present the proper motions on the question of jurisdiction." 20

That thereupon the counsel for the plaintiffs (defendants-in-error) proceeded to introduce evidence on their behalf, and that upon his offer in evidence of the bonds in suit counsel for the defendant (plaintiff-in-error) made the following objection, and the Court made the following ruling thereon:

"Mr. Robinson: The defendant would like to have noted on the record that it makes the motion to quash and dismiss heretofore made on the papers heretofore referred to and for the reasons heretofore stated, and objects to the Court proceeding with this trial or the examination of any witnesses, or of the introduction of any evidence or the reception of any testimony, and your Honor grants me an exception?" 21

The Court: I overrule the motion and an exception is granted.

(Marked Plaintiff's Exhibit No. 2.)"

- 22 That thereafter, and upon the close of the case of the plaintiffs (defendants-in-error), counsel for the defendant (plaintiff-in-error) made the following motion, and the Court ruled thereon as follows:

"Mr. Robinson: If your Honor please, the defendant moves to dismiss the complaint on the grounds heretofore stated and renews its motion to quash the service of the summons and complaint and to dismiss this cause upon the papers before Judge Hough upon which the order of October 7th, 1914, was entered, and on the grounds set forth in the notice of motion upon which that order was entered.

The Court: I overrule that motion.

- 23 Mr. Robinson: And the defendant excepts.

Mr. Herzog: I ask your Honor to direct a verdict.

Mr. Robinson: And may I note the same objection and an exception to the direction of a verdict and to be allowed the same exception?

The Court: Yes."

That thereafter, and after the direction of the verdict by the Court, the counsel for the defendant (plaintiff-in-error) moved the Court, and the Court ruled in the following terms:

- 24 "Mr. Robinson: If your Honor please, the defendant excepts to the verdict of the jury on the ground that the Court has no jurisdiction on the person of the defendant and moves to quash the service of the summons and complaint and to dismiss this action upon the ground that the attempted service of the summons and complaint herein on the defendant corporation, by delivering a copy of the same

to Frank W. Frueauff, an officer thereof, in the City, County and State thereof, was not sufficient to confer on this Court jurisdiction over the person of the defendant, was not due service on the said defendant corporation, inasmuch as said defendant corporation was organized under the Laws of the State of Ohio, maintains no office in New York State, does no business and owns no property therein, and did not at the time of the service of said summons. 25

The Court: Overruled.

Mr. Robinson: And to this motion the defendant excepts and states that this motion is made on the papers which were before Judge Hough at the time of the entry of the order of October 7th, 1914, and your Honor will allow us the usual time to prepare an appeal on the question of jurisdiction to the United States Supreme Court. Your Honor will give us the usual stay of execution? 26

The Court: I will give you the usual ten days' stay, but I think you will have to file a supersedeas.

CASE CLOSED."

ALEXANDER REISSMAN.

Sworn to before me this

27th day of February, 1917.

WALTER J. GRAHAM,

Notary Public,

(Seal) New York County.

New York Co. Clerk's No. 293.

New York Co. Reg. No. 7213

Bronx Co. Clerk's No. 12.

Bronx Co. Reg. No. 725.

Kings Co. Clerk's No. 13.

Kings Co. Reg. No. 7087.

SUPREME COURT

OF THE UNITED STATES.

THE TOLEDO RAILWAYS & LIGHT
COMPANY,

Plaintiff-in-Error,

against

WALTER L. HILL and RALPH L.
SPOTTS, as Executors of the
Last Will and Testament of
Harford B. Kirk, deceased,

Defendants-in-Error.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

PAUL M. HERZOG, being duly sworn, deposes and says, I am an attorney and counsellor-at-law and a member of the bar of the District Court for the Southern District of New York and of this Court. I was present at the trial of the above-entitled cause in the District Court for the Southern District of New York on behalf of the plaintiffs. I have read the annexed affidavit of Alexander Reissman, and the matters therein set forth accord with my recollection of the occurrences at said trial.

I am advised that to enable this Court to do full and exact justice herein it may be necessary that it be advised of the precise character of the occurrence upon the trial and of the manner in which the questions sought to be presented to this Court by the writ of error herein were sought to be raised

in the Court below, and of the manner in which and the extent to which the matters certified by said Court were presented to it. To that end I have caused this motion to be made to add to the transcript of the record herein the stenographic record of the motions made by the plaintiff-in-error upon the trial of this action and the rulings thereon by the Court. All of the said rulings were made by the Court as appears by the said stenographic record *sua sponte* and without any argument or intervention upon my part. 31

No previous application for the relief herein prayed for has been made to any Court or Justice.

PAUL M. HERZOG.

32

Sworn to before me this
27th day of February, 1917.

WALTER J. GRAHAM,
Notary Public,

(Seal) New York County.
New York Co. Clerk's No. 293.
New York Co. Reg. No. 7213.
Bronx Co. Clerk's No. 12.
Bronx Co. Reg. No. 725.
Kings Co. Clerk's No. 13.
Kings Co. Reg. No. 7087.

33

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 200.

THE TOLEDO RAILWAYS & LIGHT COMPANY,

Plaintiff in Error,

vs.

WALTER L. HILL and RALPH L. SPOTIS, as Executors
of the Last Will and Testament of Harford B. Kirk,
deceased,*Defendants in Error.*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.MEMORANDUM IN SUPPORT OF MOTION TO
AMEND RECORD.

BENDALL & HERZOG,

Attorneys for Defendant in Error,

HOWARD S. GANE, of Counsel,

Office & Post Office Address,

No. 223 Broadway,

Borough of Manhattan,

City of New York.

Supreme Court of the United States

THE TOLEDO RAILWAYS & LIGHT
COMPANY,

Plaintiff-in-Error,

against

WALTER L. HILL and RALPH L.
SPOTTS, as Executors of the
Last Will and Testament of
Harford B. Kirk, deceased,
Defendants-in-Error.

No. 200.

MEMORANDUM IN SUPPORT OF THE MOTION TO ADD TO THE RECORD.

This cause comes before this Court on a writ of error to review a judgment entered in the District Court for the Southern District of New York, in favor of plaintiffs, who are residents and citizens of the State, against a foreign corporation. The writ of error issues out of this court direct to the District Court, by reason of a certificate of the Trial Judge to the effect that a question of jurisdiction of the court was at issue (Record, p. 35).

The question of jurisdiction was sought to be raised by a motion to quash the service of the summons and complaint made prior to the interposition of an answer in the case, by an attempt to

renew the motion on the trial and by a plea to the jurisdiction contained in the answer.

The record as transmitted to this court discloses the moving papers upon which the motion to quash the service was made prior to the interposition of the answer, and discloses nothing with respect to that which took place on the trial save as it appears by the certificate of the Trial Judge.

In *Mechanical Appliance Co. v. Castleman* (215 U. S., 437, 445), under somewhat similar circumstances this Court held that certain affidavits were to be regarded as evidence submitted in support of a plea to the jurisdiction, by reason of the fact that they were printed in the record, that it did not appear by the bill of exceptions that any objection had been made to the filing of the affidavits, and that it did appear that the plaintiff in the court below had also filed an affidavit.

The purpose of this motion is to annex to the record a verified transcript of the stenographer's minutes, from which it appears that in this case the affidavits in question were not offered in support of the plea to the jurisdiction, that the plaintiffs in the court below in no manner acquiesced in their offer for such purpose in substitution for common law proof, and that the plaintiffs did not offer the affidavits which are filed in the record, as proof under the issues raised by the plea.

It is deemed important that this should appear of record, to the end that there be no misapprehension as to the course actually pursued upon the trial, and to the end that this Court may not be misled by the record into a conception that the

affidavits in question were offered as evidence in support of the plea to the jurisdiction.

Dated, New York, March 5, 1917.

Respectfully submitted,

KENDALL & HERZOG,
Attorneys for Defendants-in-Error,
HOWARD S. GANS, of Counsel,
Office and Post Office Address:
233 Broadway,
Borough of Manhattan,
City of New York.

Supreme Court of the United States,

OCTOBER TERM, 1916.

No. 200.

THE TOLEDO RAILWAYS AND
LIGHT COMPANY,
Plaintiff-in-Error,

v.

WALTER L. HILL and RALPH L.
SPOTTS, as Executors of the
Last Will and Testament of
Harford B. Kirk, deceased,
Defendants-in-Error.

Memorandum on Behalf of Plaintiff-in- Error, in Opposition to Motion to Amend Record.

The plaintiff-in-error respectfully opposes the motion to advance made on behalf of the defendants-in-error for the following reasons:

The matter which the defendants-in-error seek to have placed in the record of this case purporting to be a transcript of the stenographer's minutes taken at the trial of the action, is quite irrelevant and immaterial to the decision of this appeal. On

appeals of this class (that is, those involving only a jurisdictional question) the papers to which this Court looks as to the nature of the question presented are the certificate as to question of jurisdiction, signed by the District Judge, together with the Clerk's extract from the minutes, and of these the latter is of minor importance. The plaintiff-in-error in this case in making up the record which was approved by defendants-in-error through stipulation, carefully followed the record on appeal in two cases of this class which had already come up before the Supreme Court. They are:

Wabash Western Ry. Co. v. Brow, 164 U. S., 271.

St. Louis S. W. R. Co. v. Alexander, 227 U. S., 218.

The plaintiff-in-error submits, therefore, that the record as made up in this case contains all the relevant and material papers and conforms strictly to the established practice.

The plaintiff-in-error submits that this attempt to amend the record is, in effect, an attempt to amend the certificate as to question of jurisdiction which has already been signed in this action by Hon. W. I. Grubb, D. J. In that certificate the learned Justice of the Court below certifies the precise question in issue to this Court with whatever facts are necessary to enable this Court to reach its determination. Any attempt to annex to this certificate as a part thereof a transcript containing the record of colloquy between Court and counsel is obviously an attempt to alter or amend the certificate of the learned Judge below which has been filed in this case and has become a part of the record. This motion is, therefore, we submit, quite

irregular and improper. Any alteration or amendment of the certificate should be made by the learned Judge below himself, upon whose certificate this Court is proceeding. Said certificate, which is contained in the record at folios 75 to 79, inclusive, is quite accurate and complete, and sets forth all of the relevant facts upon this appeal, as well as a concise statement of the issue in law involved, and in it will be found everything essential for the determination of this appeal.

Furthermore, the matter contained in the affidavit of Alexander Reissman, who was the Court stenographer and whose affidavit is made the basis of this motion, appears to contain not only what purports to be colloquy between Court and counsel at the time the case was called for trial and which is set forth in quotation marks in his affidavit, but also certain statements as to what took place before and during the progress of the trial, which we submit is not properly part of the stenographer's minutes. Even if it should be granted, therefore, that it was proper, or at least not objectionable, to insert some new matters in this record, nevertheless, we submit that this Court can not properly determine just what portion of the language set up in the affidavit of Alexander Reissman should be included as the proper stenographic minutes of this case, but that the record would have to go back to the Clerk of the United States District Court for the Southern District of New York in order that he may make proper certificate in respect thereof.

For the reasons above set forth, we respectfully submit that this motion should be denied.

Respectfully submitted,

CHARLES A. FRUEAUFF,
Solicitor for Plaintiff-in-Error.

WLS
FILED.

MAY 18 1916

JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1915.

No. 570 **200**

THE TOLEDO RAILWAYS & LIGHT COMPANY,
Plaintiff-in-Error,

vs.

WALTER L. HILL and RALPH L. SPOTTS, as Executors
of the Last Will and Testament of Harford B. Kirk,
deceased.

Defendants-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

MOTION TO ADVANCE AND BRIEF ON BEHALF OF DEFENDANTS-IN-ERROR.

HOWARD S. GANS,
of Counsel for Defendants-in-Error.

PAUL M. HERZOG,
ARTHUR S. LEVY.

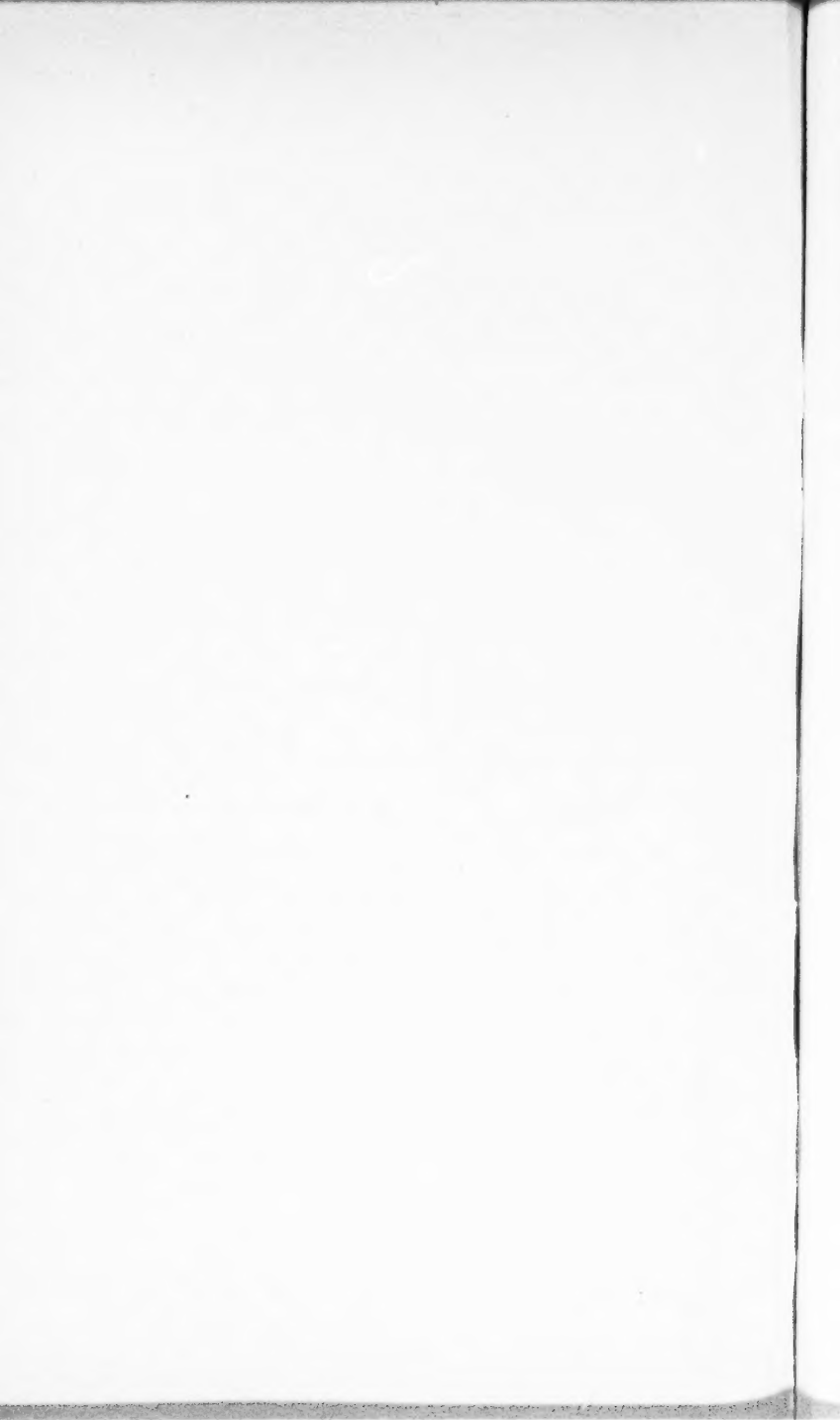


TABLE OF CONTENTS.

	PAGE
Motion to Advance.....	1
Affidavit of Service of Notice of Motion and Brief	2
Statement of Case.....	4
Argument	5
I—The service of the summons was valid and effectual to give the Court juris- diction	5
A—For the purposes of this suit the defendant is estopped from denying that it is doing business in New York.....	6
B—The defendant is in fact doing business in New York.....	8
II—Assuming that defendant is not in fact doing business in New York, no proof tending to show this fact was presented to the Trial Court, which was therefore bound to give judgment for the plaintiffs.....	14
III—The defendant has appeared gener- ally, thereby curing any defect in the service and submitting itself to the jurisdiction	16
A—The defendant obtained exten- sions of time to plead.....	16
B—The defendant has answered on the merits	17

INDEX OF AUTHORITIES.

	PAGE
Caskey v. Chenoweth, 67 Fed., 712.....	17
Central Grain & Stock Exchange v. Board of Trade of Chicago, 125 Fed., 463.....	17
Chase v. Wetzlar, 225 U. S., 79.....	15, 16
Commercial Mutual Accident Co. v. Davis, 213 U. S., 245.....	8
Crawford v. Foster, 84 Fed., 939.....	17
Eddy v. Lafayette, 49 Fed., 807; jt. aff'd 163 U. S., 456.....	18
Edgell v. Felder, 84 Fed., 69.....	17
Harkness v. Hyde, 98 U. S., 476.....	17
Hupfeld v. Automaton Piano Co., 66 Fed., 788	17
Lumbermans Ins. Co. v. Meyer, 197 U. S., 407	6, 7, 8, 12
Murphy v. Herring-Hall-Marvin, 184 Fed., 495	17
Noonan v. Delaware, L. & W. R. Co., 68 Fed., 1	16
O'Donnell v. Atchison, T. & S. F. R. R. Co., 49 Fed., 689	16
St. Louis S. W. Ry. Co. v. Alexander, 227 U. S., 227	8

IN THE
Supreme Court of the United States

THE TOLEDO RAILWAYS & LIGHT
COMPANY,

Plaintiff-in-Error,

VS.

WALTER L. HILL and RALPH L.
SPOTTS, as Executors of the
Last Will and Testament of
Harford B. Kirk, deceased,
Defendants-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR THE SOUTHERN DISTRICT OF
NEW YORK.

AND NOW, this fifth day of June, 1916, come the defendants-in-error, by ~~their~~ counsel, and move the Court to advance the above-entitled cause for hearing in the manner prescribed by Rule Six in accordance with Rule Thirty-two of this Court, because the only question in issue is the question of the jurisdiction of the Court below.

HOWARD S. GANS,
of Counsel for Defendants-in-Error.

SOUTHERN DISTRICT OF NEW YORK, ss.:

ARTHUR S. LEVY, being duly sworn according to law, deposes and says: That on the 12th day of May, 1916, he served a notice in the form attached hereto as Exhibit A and five copies of this brief upon Messrs. Frueauff & Robinson, counsel for the plaintiff-in-error, at the office of said counsel, No. 60 Wall Street, New York City, N. Y., by delivering said notice and copies of brief to the person in charge of the office of said counsel and leaving the same with him.

ARTHUR S. LEVY.

Sworn to and subscribed before me this 12th day of May, 1916.

WALTER J. GRAHAM,

Notary Public,

New York County.

(SEAL)

New York Co. Clerk's No. 293.

New York Co. Reg. No. 7213.

Bronx Co. Clerk's No. 12.

Bronx Reg. No. 725.

Kings Co. Clerk's No. 13.

Kings Co. Reg. No. 7687.

Exhibit A.

Messrs. Frueauff & Robinson,
60 Wall Street, New York City.

PLEASE TAKE NOTICE that on Monday, June 5th, 1916, I will present to the Supreme Court of the United States, in the matter of Toledo Railways & Light Co., Plaintiff-in-Error, vs. Walter L. Hill and Ralph L. Spotts, as Executors of Harford B. Kirk, deceased, Defendants-in-Error, the motion of which the enclosed is a copy. I also hand you herewith five copies of the brief which will be presented with the motion.

Dated, New York, May 12th, 1916.

Yours, etc.,

HOWARD S. GANS,
of Counsel for Defendants-in-Error.

STATEMENT OF THE CASE.

This case is before the Court on writ of error direct from the District Court for the Southern District of New York, upon the sole question of the jurisdiction of the District Court. The action was commenced in the Supreme Court of the State of New York, by the service of the summons and complaint in said State on one Frank W. Frueauff, a resident of said State and one of the directors and vice-president of the defendant corporation. The defendant is an Ohio corporation. The plaintiffs are executors of Harford B. Kirk, deceased, late a resident of the State of New York. Walter L. Hill, one of the plaintiff-executors, was at the commencement of the action a resident of Massachusetts. Ralph L. Spotts, the other plaintiff-executor, is a resident of New York. Since the commencement of the action Walter L. Hill has died, but by consent the action is prosecuted under its original title.

The action is brought to recover upon twenty-five coupon bonds issued by the defendant, and being part of a series of 12,000 bonds all of like tenor, amount, date and effect, each in the sum of \$1,000, payable on the 1st day of July, 1909, at the fiscal office of the defendant in the City of New York. Three unpaid coupons in the usual form in the sum of \$20 each are attached to each bond, also expressed to be payable at the fiscal office of the defendant in the City of New York. One of said bonds and coupons is printed in the record at pages 22 *et seq.*

After the commencement of the action it was, upon petition of the defendant, removed to the District Court of the United States for the Southern District of New York, upon the ground of diversity

of citizenship. Thereafter the defendant made a motion in the said District Court to vacate the service of the summons on the ground that the defendant was not doing business in the State of New York. Affidavits on behalf of both sides were submitted on this motion, and the motion was denied. No appeal was taken from the order denying the motion, but the defendant answered both to the merits and the jurisdiction. The case thereafter came on to be tried. The defendant presented no proof and contented itself with renewing its motion to vacate the service. The Trial Court, after taking the plaintiffs' proof of the allegations of the complaint, directed a verdict for the plaintiffs. The case comes up on writ of error and the certificate of the District Judge that the sole question involved is the jurisdiction of the Court below.

I.

The service of the summons was valid and effectual to give the Court jurisdiction.

There is no dispute that the summons was served June 29th, 1914, on one Frank W. Frueauff in the State of New York and Southern District of New York; that said Frueauff then was and had been since April, 1913, a director of the defendant company, and then was and had been since January, 1914, its vice-president; that said Frueauff then was a permanent resident of the State of New York, and of the Southern District of New York. One of the plaintiffs is a resident of New York and the contract was made in New York to be performed in New York. The service was, therefore, perfect under the State Law.

N. Y. Code of Civil Procedure, Sec. 432.

After removal to the Federal Court, the defendant made its motion to quash the service, relying on the rule in that Court that the defendant must do business in the jurisdiction. We concede that such is the rule, and the only question under this point is whether the defendant is doing business in New York, or is precluded from asserting that it is not so doing business, which matters we proceed to consider separately in inverse order.

A.

The motion to vacate the service came on to be heard before District Judge HOUGH, who denied it, as appears from his opinion (fols. 52-53-54), on the ground that the defendant had agreed in its contract to maintain a fiscal office in the State of New York, and thereby to engage in business in that State, at any rate for the purposes of this contract; that it could not be heard to say that by refusing to keep its obligation it had ousted the Court of jurisdiction. We believe that under the reasoning of *Lumbermans Ins. Co. v. Meyer*, 197 U. S., 407, relied on by the District Judge, and to which we will presently advert at more length, this decision is sound, but the plaintiffs' case is by no means dependent upon it. The record discloses and there is no doubt in our mind that the defendant is actually doing business in New York in a very substantial way. This latter question, however, will be discussed under our head B of this point.

In *Lumbermans Ins. Co. v. Meyer*, *supra*, a service upon a New York director of a Pennsylvania company was held good on the ground that the policy clearly implied that the company was in the case of loss to do business in New York, by sending its agent there to adjust the loss. In the case at

bar the contract contemplates that the defendant will maintain a fiscal office in the City of New York, for by their terms the bonds are payable at such fiscal office. As the District Judge points out, the Lumbermans Ins. Co. having obviously not adjusted the loss, had not done what its contract implied, but the Court did not for that reason relieve it of the obligation it had assumed and upon which the plaintiff was entitled to rely.

The following quotations from the *Lumbermans Ins. Co.* case will show how closely the reasoning there may be paralleled in the present case, except that here the maintenance of a fiscal office is even more positively the doing of business than the sending of an agent:

"The provisions of the policy clearly contemplate the presence of an agent of the company at the place of the loss after it has occurred."

"As the policy insures against loss, it of course contemplates that such loss may occur, and it also contemplates that the company shall send to the place where the loss occurred, that is, to New York, its agent, for the purpose stated." (As the bond in the instant case was for an absolute payment, the arrival of its due date was certain to occur.)

"It (the company) is doing (in adjusting the loss) the act provided for in its contract, at the very place where, in case a loss occurred, the company contemplated the act should be done; and it does it in furtherance of the contract and in order to carry out its provisions, and it could not properly be carried out without this act being done." (Italics ours.)

"This is not a sporadic case, nor the contracts in suit the only ones of their kind issued."

Every word of this might have been written in the case at bar. If these considerations are not perfectly nugatory, they mean that the defendant will not be heard to deny that it has done what it agreed to do, what the contract contemplated that it should do and without the doing of which the contract could not be performed.

The doctrine of *Lumbermans Ins. Co. v. Meyer* has been followed and even extended by this Court in *Commercial Mutual Accident Co. v. Davis*, 213 U. S., 245, a case in which the company merely reserved to itself the right to send a representative, etc.

If the test is to be the contemplation of the contract, there can be no question but that the District Judge was right, and that the defendant in the case at bar cannot be heard to advance what he terms the "dishonest argument" that by refusing to carry out its contract it has ceased to do business in New York.

B.

The defendant is actually engaged in business in New York, more than sufficiently to bring it within the jurisdiction. There is no hard and fast rule as to what constitutes doing business to the extent required to permit of service in a given jurisdiction, but each case must be decided on the particular facts disclosed.

St. Louis S. W. Ry. Co. v. Alexander, 227 U. S., at page 227.

The affidavits submitted by the defendant are replete with unqualified statements to the effect that the defendant does not do and never did any

business in New York. These statements when looked at in the light of the actual facts would appear to be, to say the least, disingenuous. The bonds are expressed to be payable principal and interest at the fiscal office of the company in the City of New York, and interest was admittedly paid thereon in said city for a number of years. We cannot comprehend how, at least for the period that such fiscal office was maintained, it can be denied that the defendant was doing business in New York. Mr. Frueauff denies it (first sentence of paragraph Sixth of his affidavit, fol. 38). A careful scrutiny of his affidavit discloses that the only basis for this denial is the fact (1) that the company did not apparently pay rent and put its name on the door, but constituted a New York banking house its fiscal agent, and (2) that the payments were made in New York for the convenience of the bondholders (fols. 38, 39). The cogency of this latter fact may be clear to one who styles himself a "public service financier and expert." To counsel for the plaintiffs it is the fact that the company maintained a fiscal office in New York and not its motive in doing so that is controlling. It should also be noted that the president of the defendant company frankly admits that the defendant had an office and assets in New York prior to 1909 (fol. 23), although in the same breath denying that even then it was doing business in that State.

Mr. Frueauff also denies that the defendant company is now doing business in New York or that he represents it there. The basis of this denial seems to be that, although Mr. Frueauff is vice-president of the defendant, he manages its properties in the capacity of vice-president of another

corporation called the Cities Service Company, one of the defendant's principal stockholders. We submit that one who is an officer of a holding company and also of its subsidiary company cannot escape responsibility by swearing that he is acting for the holding company only.

Mr. Frueauff denies (fol. 38) that he performs any "executive" duties for the defendant, and denies that he or any other member of the firm of Henry L. Doherty & Co. is "actively" engaged in the "executive" management of the defendant (fol. 38), and adds that the members of the said firm of Henry L. Doherty & Co., of which he is one, are from time to time consulted as public service experts on financial, engineering and other problems (fol. 37). We do not know what Mr. Frueauff considers "executive" duties. We do know that it affirmatively appears (fol. 42) that Mr. Frueauff's firm entered into a contract still unexpired to direct the management of the Toledo properties, and for this contract and certain underwriting, received several million dollars in stock. We quote from the circular issued to bondholders and incorporated in the papers on appeal (fol. 42). This circular was issued in connection with the same "reorganization" to which frequent reference is made in the defendant's answer (paragraphs Sixth and Seventh of the Answer, fols. 60, 61, 62):

*"We (Henry L. Doherty & Co.) are to receive 25% of the Common Stock for agreeing to direct the management of the Company for a period of five years and for underwriting * * *."*

"The Common Stock is to be placed in a voting trust which will contract with us for the management of the property." (Italics ours.)

This from the very firm of Henry L. Doherty & Co. of which the Mr. Frueauff who now swears he has no part in the management of the company is a member. Or perhaps Mr. Frueauff of the many capacities considers that when he performs his duties under this contract he sheds his coat as vice-president of the defendant and becomes for the nonce solely a member of his private firm. In their brief below counsel for the defendant suggested the impossibility of managing a Toledo property from New York. More surprising things than this are done in the realm of railway finance, and in any case the fact remains that Mr. Frueauff contracted to do it, has been paid for doing it, and it becomes him very ill to assert that he pocketed the reward for doing what he always knew to be impossible.

Moreover, suppose he be taken at his word, and it be admitted that he performs no "executive" duties. We are not aware that it is by "executive" duties alone that an officer must represent his corporation. The financing of a street railway is not the least important of its activities, and if an officer is engaged in marketing securities or otherwise providing for the financial needs of his company, he is as genuinely representing it as if he acted for it in any other capacity. Mr. Frueauff admits that "as a member of Henry L. Doherty & Co." he assists the defendant relative to financial, engineering and other problems. Again we deny the gentleman the privilege of changing his capacity by the operation of his mind for the purpose of this suit. We submit that he *is* the vice-president of the defendant, and that when the defendant requires his service, advice or assistance he cannot then resolve himself into a member of the firm of Henry L. Doherty & Co., for the purpose


of maintaining that he never represented the defendant and so oust the Court of jurisdiction.

Moreover, if, as we believe, the company is doing business in the State of New York, and is managed from New York, it matters little whether Mr. Frueauff, who was served, does or does not do any particular act representing the defendant. We quote the following from *Lumbermans Ins. Co. v. Meyer*, 197 U. S., 407, as being peculiarly pertinent to this question, the situation as to a public service corporation which markets its securities in New York being much the same as that of the insurance company with respect to the confidence inspired by resident directors and officers:

“A foreign fire insurance company doing business within another state, and voluntarily electing a part of its directors from among those who are residents of such state, may be said by that very fact to add to the confidence of possible insurers with the company in that state, and in that way to secure more business therein than would otherwise be the case. *Although doing no particular act in the state for this company*, such directors are, nevertheless, * * * a part of the governing body of the company * * *.” (Italics ours.)

We desire further to call the attention of the Court to the fact that, (1) as appears from the answer of the defendant (fol. 59), the title to all of the “real and personal property, rights, privileges, grants, contracts, securities, choses in action and franchises of the defendant, including all property and rights thereafter to be acquired by it or consolidated with it,” is in the United States Mortgage & Trust Company of the City of New York, having been conveyed to it by a certain deed of

trust, to which the defendant's answer specifically refers. (2) The bonds are expressed to be invalid until authenticated by the certificate of the trustee, a New York corporation, and the bonds in suit are so authenticated (fol. 72). (3) The bonds were sold to the plaintiffs' testator in New York (fol. 32) and were printed in New York by the American Bank Note Company. We may therefore summarize the situation as showing that the defendant caused to be printed in New York and offered for sale in New York its bonds, its obligation under which was to be performed wholly in New York at the fiscal office of the company in New York, which bonds were purchased in New York by a resident of New York; that thereafter, in pursuance of its contract, and for some time after the due date of the bonds, the defendant maintained its office and kept property within New York; that at the commencement of the suit the defendant maintained officers and directors resident in New York; that these officers are the individual members of a New York firm which is managing the properties of the defendant under contract; that these officers by their own admission are consulted and advise the company upon financial, engineering and other matters, and that the legal title to all of the company's property is in a New York trust company. We submit that the Court should look to the substance rather than to the technical form of the intricate inter-relations of these firms, individuals and corporations, and hold that the defendant is actually engaged in business in the State of New York.



II.

Assuming that the defendant is not in fact doing business in New York, no proof tending to show this fact was presented to the Trial Court, which was therefore bound to give judgment for the plaintiffs.

This is not an appeal from the order denying the motion to quash the service, but from the judgment at the trial, and the Trial Court could act only on the testimony before it. If, therefore, the proof as offered at the trial upon the disputed question of fact upon which jurisdiction rests (*i. e.*, was the defendant doing business in New York) afforded no basis upon which the Court could find for the defendant, the judgment must be affirmed. *The affidavits submitted upon the motion to quash were not before the Trial Court.* The defendants-in-error have consented that they be printed in the record so that the whole matter may be before this Court, should it deem this point not well taken, but the fact remains that these affidavits were not offered in evidence, and would not have been competent evidence if offered. The defendant should have offered testimony in support of its plea to the jurisdiction. It did not. It offered no testimony whatever upon any point. We believe, as we shall presently point out, that the burden of proof in the matter of the disputed jurisdictional question of fact was upon the defendant, but assuming it to be upon the plaintiffs, they sufficiently sustained the burden. By offering the bonds in evidence the plaintiffs established at least a *prima facie* case showing that the defendant maintained a fiscal office in the City of New York, the bonds

being expressed to be payable at such fiscal office. This certainly required the defendant to proceed to overcome the presumption, with proof that the defendant had abandoned such fiscal office, and had it done so, the plaintiffs could have offered their testimony showing the other facts pointed out in this brief upon which they rely to show the doing of business. However, the burden of proof upon the disputed jurisdictional fact was initially upon the defendant, and had the plaintiffs' case contained nothing whatever upon the point, the Trial Court would have been bound none the less to overrule the defendant's plea and direct judgment as it did. The question of the burden of proof in such cases is carefully discussed by this Court in *Chase v. Wetzelar*, 225 U. S., 79, in which the authorities are reviewed and the determination reached that where there exists a disputed question of fact going to the jurisdiction, the burden is upon the plaintiff where the objection addresses itself to the want of all foundation for judicial action, but otherwise where the objection is less fundamental in its nature and not of such a character as to strip the Court of power to make a binding decree. The question here involved is indubitably of the latter class. Whether the defendant is doing business in the State is not a question striking at the foundation of all judicial action in the matter. The action was unimpeachable in the State Court. There was present in the jurisdiction a resident officer of the defendant who was served, so that there was certainly not that entire lack of a person or property within the jurisdiction over which the authority of the Court could be exerted. The rule that the defendant must be doing business in the district is founded not on any inherent necessity that such shall be the case in order to give the Court control

of the person of the defendant, but rather upon the convenience of the defendant and the hardship that might often be worked by the contrary rule. The rule itself was long in doubt and the question involved is clearly of a class with the citizenship of parties, or the amount in dispute, in which class of cases, as stated in *Chase v. Wetzlar, supra*, the burden of offering testimony is upon the pleader who assails the jurisdiction.

III.

The defendant has appeared generally, thereby curing any defect in the service and submitting itself to the jurisdiction of the Court.

That a general appearance waives a lack of jurisdiction over the person of the defendant has long been well settled, and that it will work a waiver of the particular objection that the action is brought in the wrong district has been determined.

Noonan v. Delaware, L. & W. R. Co., 68 Fed., 1.

Especially where the service, as is the case here, was good in the State Court.

O'Donnell v. Atchison, T. & S. F. R. R. Co., 49 Fed., 689.

We claim two acts on the part of the defendant, either of which constitutes a general appearance.

A. *The defendant obtained extensions of time to plead.* Its time to answer the complaint expired July 19, 1914 (fol. 14 of record). Their an-

swer was served October 10, 1914 (fol. 64). The extension from September 12, 1914, to the date of service of the answer was by order of the District Judge extending their time to "plead herein or make such motion relative to the complaint as they may be advised" (fol. 20). (Intermediately the time was extended by stipulation of the attorneys, but this does not appear affirmatively in the record.)

This constitutes a general appearance.

Hupfeld v. Automaton Piano Co., 66 Fed., 788.

Murphy v. Herring-Hall-Marrin, 184 Fed., 495.

B. *The defendant has answered on the merits.* The older cases are uniform in holding that by answering the defendant appears generally and cures a defect in the service.

Caskey v. Chcnoweth, 62 Fed., 712.

Edgell v. Felder, 84 Fed., 69.

And that no words of reservation can make such an appearance a special one.

Crawford v. Foster, 84 Fed., 939.

We are aware that the opposite rule obtained in *Harkness v. Hyde*, 98 U. S., 476, and cases relying thereon, such as *Central Grain & Stock Exchange v. Board of Trade of Chicago*, 125 Fed., 463, but the doctrine of the *Harkness* case has been held inapplicable where the Court had jurisdiction of the subject-matter of the action and the process was served within the territorial jurisdiction of the Court.

Eddy v. Lafayette, 49 Fed., 807, judgment affirmed but without expressing opinion on this point, 163 U. S., 456.

The judgment should be affirmed.

Respectfully submitted,

HOWARD S. GANS,
of Counsel for Defendants-in-Error.

PAUL M. HERZOG,
ARTHUR S. LEVY.

